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MASSACHUSETTS REPORTS

192

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS

MAY 1906 — OCTOBER 1906

HENRY WALTON SWIFT

REPORTER

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JUSTICES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

HON. MARCUS PERRIN KNOWLTON, CHIEF JUSTICE.

HON. JAMES MADISON MORTON.

HON. JOHN LATHROP.
(Resigned September 11, 1906.)

HON. JOHN WILKES HAMMOND.

HON. WILLIAM CALEB LORING.

HON. HENRY KING BRALEY.

HON. HENRY NEWTON SHELDON.

HON. ARTHUR PRENTICE RUGG.
(Appointed September 26, 1906.)

ATTORNEY GENERAL.

HON. DANA MALONE.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

MARY E. DALTON *vs.* RICHARD GIBSON.
MATTHEW J. DALTON *vs.* SAME.

Suffolk. January 19, 1906. — May 17, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, & SHELDON, JJ.

Landlord and Tenant. Evidence.

The servant of a lessee of a part of a building who is injured on the leased premises owing to a want of repairs has no greater rights against the lessor than the lessee himself.

Where one takes a lease of certain rooms in a building, covenanting that he will keep the premises in such repair, order and condition as they are in at the commencement of the term or may be put in during its continuance, and the premises are in good condition when he takes the lease, if afterwards he is injured by the plastering of the ceiling falling upon him owing to a leak in a flat roof not included in the premises let to him, he cannot recover from the landlord for his injuries, as it is his own duty to repair the ceiling and the landlord owes him no duty to repair the roof; and the same is true if the person injured is the servant of the tenant who as against the landlord has no greater rights than his employer.

If a landlord makes repairs at the request of a tenant this is not an admission of his liability or obligation to make the repairs.

TWO ACTIONS OF TORT, the first to recover damages for personal injuries sustained by the plaintiff while at work in the store numbered 28 on Eliot Street in Boston, and the second by

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the husband of the plaintiff in the first case to recover for the loss of her services and for expenditures for medicine, medical attendance and nursing occasioned by the injuries. Writs dated December 19, 1902.

The cases were tried together before *White*, J. The plaintiff in the first case introduced evidence tending to prove the following facts:

The store in question was situated on Eliot Street in the city of Boston and numbered 28 on that street. It was part of a five story building and was leased by the defendant Gibson to one Hammond. The store was adapted for and used as a restaurant by Hammond. It comprised the whole of the first or ground floor excepting a small portion, which was partitioned off from the remainder and constituted a hallway and entrance to the upper floors of the building; this entrance was numbered 30. The restaurant had no connection with the other parts of the building. The remainder of the building above the first or street floor was used as a dwelling house, and was occupied by tenants other than Hammond.

The restaurant consisted of a dining room fronting upon the street with a kitchen in the rear. A portion of the kitchen adjacent to the easterly side wall of the building was covered with a composition roof which measured eight feet by twelve; upon this roof a number of boards were laid and a clothes shed was constructed, used by the occupants of the dwelling house for drying clothes. This shed was uncovered, and above it was a light and air space extending to the roof of the main building. The roof covering the kitchen was not a part of the premises leased by Hammond and never was used by him. The only means of access to it was through the remaining portion of the premises not leased to Hammond by means of the entrance numbered 30.

On May 26, 1902, the plaintiff, Mary E. Dalton, entered the employ of Hammond as a cook, and on that day began work at about eight o'clock A. M., and at about five o'clock P. M. on the same day while she was engaged in the performance of her duties as such employee and in the exercise of due care she was struck by a large piece of plaster which fell from the ceiling of the kitchen, and received the injuries complained of.

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The plaintiff also offered evidence tending to prove that within a month or two before the accident Hammond noticed a leak in the kitchen ceiling at the point from which the plaster subsequently fell and struck the plaintiff; that the water came through the ceiling at this point and fell upon the floor of the kitchen; that the place from which the plaster fell was directly under the composition roof at the point where it joined the side wall of the building and directly above the spot where the plaintiff was standing when she was injured; that shortly after the leak was discovered Hammond made complaint to the agent of the defendant requesting that the roof be repaired; that in about a month thereafter the defendant sent his men there to repair the roof; that these men went upon the roof and worked there; that within a short time thereafter during a rain storm the rain again came through the roof and ceiling at the same place, that is, the place where the plaster fell.

The defendant introduced in evidence a lease of the store numbered 28 Eliot Street from the defendant to Hammond, which contained the following covenants on the part of Hammond:

"Will keep all and singular the said premises, in such repair, order and condition as the same are in at the commencement of said term, or may be put in during the continuance thereof

"And at the expiration of said term will remove his goods and effects, and those of all persons claiming under him, and will peaceably yield up to the lessor the said premises, and all erections and additions made to or upon the same, in good repair, order and condition in all respects, damage by fire or other unavoidable casualty excepted; and will hold the lessor harmless and indemnified against any injury, loss or damage to any person or property on said premises

"And the lessor or his agents may during the said term, at seasonable times enter to view the said premises. . . .

"And may make repairs and alterations if he should elect so to do."

The defendant also introduced evidence tending to prove that the premises were in good condition on the date when the lease was made by the defendant to Hammond.

At the close of the evidence, the judge ruled that the plaintiffs were not entitled to recover, and ordered verdicts for the defend-

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ant. The plaintiffs alleged exceptions. It was agreed that if the rulings and orders of the judge were right, judgment might be entered upon the verdicts; and, if wrong, judgment might be entered for the plaintiff in the first case in the sum of $900, and for the plaintiff in the second case in the sum of $200.

James J. McCarthy, (*W. J. O'Donnell* with him,) for the plaintiffs.

J. Lowell & J. A. Lowell, for the defendant.

HAMMOND, J. These were two actions of tort, the first to recover damages for personal injuries received as hereinafter described, and the second by the husband of the first named plaintiff to recover for loss of service, and for expenses incurred for medical attendance and nursing, of his wife. Since the right of the husband to recover must stand or fall with that of his wife, the discussion will be confined to her case, and the term "plaintiff" will be understood as applying simply to her.

The plaintiff, while at work as a servant in the employ of one Hammond, in a kitchen which was a part of premises let to him by the defendant, was injured by the fall of plastering from the ceiling. The building of which the premises hired by Hammond were a part was owned entirely by the defendant. This part was upon the ground floor, and consisted of a dining room fronting on the street, with a kitchen in the rear. A portion of the kitchen adjacent to the easterly wall of the building was covered with a composition roof which measured eight feet by twelve feet. Upon this roof a number of boards were laid and a clothes shed constructed, which was used by the other tenants of the building for drying clothes. This shed was uncovered, and above it was a light and air space extending to the roof of the main building. The shed and roof covering the kitchen were not a part of the premises let to Hammond and were never used by him; and the only means of access to the roof was through a part of the building not let to him.

The lease under which Hammond held provided that he would "keep all and singular the said premises, in such repair, order and condition as the same are in at the commencement of said term, or may be put in during the continuance thereof." The

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defendant introduced evidence tending to prove that the premises were in good condition at the time of the letting.

The plaintiff, being in the employ of Hammond, can have no greater rights under the circumstances disclosed in this case than he had. *Roche* v. *Sawyer*, 176 Mass. 71. *Jordan* v. *Sullivan*, 181 Mass. 348. *Phelan* v. *Fitzpatrick*, 188 Mass. 237. By the terms of the lease Hammond was under an obligation to keep in repair the ceiling, since it was a part of the kitchen; and the defendant owed to him no duty to repair the roof. The work done by the defendant is not shown to have been done in pursuance of any agreement to repair, and is not to be regarded as an admission of his liability or obligation to repair. *Phelan* v. *Fitzpatrick*, *ubi supra*. It follows that the ruling of the trial court was right.

Exceptions overruled.

JOSEPHINE L. SEAMAN *vs.* MARY E. HARMON & others.

Suffolk. January 26, 1906. — May 17, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, & SHELDON, JJ.

Dower. Husband and Wife. Marriage and Divorce. Equity Jurisdiction. Trust.

In this Commonwealth a wife has no dower in real estate in which her husband's title was merely equitable and of which he never had the legal seisin at any time during the coverture.

A wife had obtained a divorce against her husband for the cause of adultery, and thereby under R. L. c. 152, § 24, was "entitled to her dower in the same manner as if he were dead." Her husband, before the divorce and while he was living apart from her, had procured the conveyance of certain real estate by its former owner to the husband's sister, in trust to pay him the rents and profits during his life and to allow him to use and enjoy it during that time, also, at his request, to sell and convey it or any part of it free from the trust and to pay the proceeds to him, to mortgage it at his request, and to convey it to such person as he might direct by his last will, and in default of such direction to convey it to his heirs at law. At the request of the husband his sister as trustee conveyed the real estate by a mortgage deed to a mortgagee who was a purchaser for value in good faith and who recorded the mortgage. Later the mortgagee advertised the land for sale for a breach of a condition in the mortgage, and the wife brought a suit in equity against the mortgagee to restrain the foreclosure. The plaintiff's divorced husband had died intestate. *Held*, that the defendant's title was complete against the plaintiff's claim of dower, and that the bill must be dismissed.

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A remark in *Leonard* v. *Leonard*, 181 Mass. 458, 461, in regard to the deed of conveyance in the case of *Brownell* v. *Briggs*, 173 Mass. 529, being "left in the grantor's possession" explained after inspection of the record in the last named case.

A power reserved in an instrument creating a trust to revoke or terminate the trust does not make the trust invalid.

LATHROP, J. This is a bill in equity by which the plaintiff seeks to restrain the foreclosure of a mortgage of a parcel of land in Stoneham. The bill was filed in the Superior Court on October 21, 1904. After a hearing in that court, the bill was dismissed with costs, and the case is before us on the plaintiff's appeal.

The plaintiff was married to George N. Seaman on June 22, 1870. On August 9, 1893, Mr. Seaman, who was then living apart from his wife, caused the land in question to be conveyed by its previous owners to his sister Ellen F. Davis, in trust to pay to him the net rents and profits during his life, and to allow him to use and enjoy the same during that time; also, at his request, to sell and convey the same or any part thereof free from the trust, and to pay the proceeds to him; also to mortgage the same at his request; also to convey the same to such person to whomsoever he might direct by his last will, and in default of such direction to convey the same to his heirs at law.

On February 15, 1895, at the request of George N. Seaman, Ellen F. Davis, as trustee, conveyed the land in question by a mortgage deed to the defendant Harmon, who was a purchaser in good faith, for the sum of $3,200.

On February 28, 1896, the plaintiff obtained a divorce from the bond of matrimony against her husband by reason of adultery on his part. The husband was ordered to pay $1,000 as alimony, and this amount was paid. This decree became absolute on August 29, 1896.

At the time of the bringing of this bill Harmon had advertised the land for sale for breach of a condition contained in the mortgage.

George N. Seaman died on April 19, 1904. While the case was pending in the Superior Court, the administrator of the estate of George N. Seaman and Carrie M. Seaman, in her own right as wife of George N. and as guardian of their infant son, were made parties defendant.

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The statutes applicable to this case are the R. L. c. 152, § 24, and c. 132, § 1. Chapter 152, § 24, reads as follows: "After a divorce, a wife shall not be entitled to dower in the land of her husband, unless, after a decree of divorce nisi granted upon the libel of the wife, the husband dies before such decree is made absolute, except that, if the divorce was for the cause of adultery committed by the husband or because of his sentence to confinement at hard labor, she shall be entitled to her dower in the same manner as if he were dead." Chapter 132, § 1, provides: "A wife shall, upon the death of her husband, hold her dower at common law in her deceased husband's land."

There is no statute in this Commonwealth which gives a wife dower in the estate of which her husband has only an equitable title. At common law the wife has no dower in the estate of which the husband did not have a legal seisin at some time during the coverture. *Reed* v. *Whitney*, 7 Gray, 533. *Lobdell* v. *Hayes*, 4 Allen, 187. *Brooks* v. *Everett*, 13 Allen, 457. *Simonds* v. *Simonds*, 112 Mass. 157, 164. See also *Flynn* v. *Flynn*, 171 Mass. 312.

The plaintiff relies upon the case of *Brownell* v. *Briggs*, 173 Mass. 529. But as was said in *Leonard* v. *Leonard*, 181 Mass. 458, 461, "It is obvious that the decision in *Brownell* v. *Briggs* must be read with an eye to the precise facts on which it arose." It differs essentially from the case before us. There the facts show that the land had stood in the name of the husband and was conveyed by him to his grandniece. Here the land never stood in his name. There it was conveyed without consideration. Here the mortgagee paid a valuable consideration. There the deed was not recorded until after the death of the grantor. Here it was duly recorded. The two cases are clearly distinguishable.

There is a remark in *Leonard* v. *Leonard* in regard to *Brownell* v. *Briggs* which might mislead one not familiar with the facts. It is said that the conveyance was "left in the grantor's possession." It might be inferred from this that there was no delivery of the conveyance. On examining the bill of exceptions in *Brownell* v. *Briggs*, it appears that this was the demandant's contention, and there was evidence to this effect; but the tenant testified that the deed was delivered to her on

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the day of its execution, that she kept it for several months, when the grantor took it, as he said, for the purpose of having it recorded. It was not however caused to be recorded by him, and was found among his effects after his death, and was then recorded by the tenant. On the disputed question of fact the judge found that the deed was delivered in the lifetime of the grantor.

The fact that there is a power of revocation in the trust instrument is consistent with the creation of a valid trust. *Stone* v. *Hackett*, 12 Gray, 227. *Kelley* v. *Snow*, 185 Mass. 288.

Decree affirmed.

M. H. Browne, (*J. M. Browne* with him,) for the plaintiff.

L. M. Abbott & R. E. Buffum, for the defendants.

CHARLES W. LUCE *vs.* CHARLES P. PARSONS & others.

Essex. February 26, 1906. — May 17, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, & SHELDON, JJ.

Land Court. Superior Court. Practice, Civil, Appeal. *Adverse Possession. Evidence*, Competency, Declarations of deceased persons, Declarations concerning boundaries, Opinion: experts.

Under R. L. c. 128, § 18, as amended by St. 1902, c. 458, St. 1904, c. 448, and St. 1905, c. 288, on an appeal to the Superior Court from a decree of the Land Court, if the issues framed in the Land Court are found in the Superior Court to be inadequate properly to present all the matters specified in the appeal, *semble*, that the Superior Court has power, on the application of a party, to modify or enlarge the issues relating to the matters specified, although the Superior Court would not be expected to frame additional issues or to change existing issues without very good reasons for doing so.

When an appeal to the Superior Court from a decree of the Land Court specifies no matters which are not adequately presented by the issues framed by the judge of the Land Court no questions of fact other than those raised by the issues can be tried on the appeal.

One proving a title by adverse possession may include the possession of his predecessor in title which has been transferred to him.

On the issue, whether the possession of one who claimed certain land under a deed and that of his predecessor in title were adverse, it is competent for the person making such claim to show that he paid $9,000 for the land, that his predecessor in title and possession brought an action for trespass against a street railway company for constructing its railway over a part of the land, and that this same predecessor built a cottage upon the land which cost him about $1,200.

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On the question, whether the possession of a deceased predecessor in title of one claiming certain land was adverse, the person claiming the land may put in evidence, under R. L. c. 175, § 66, the declarations of his deceased predecessor as to his occupation of the land, and his declarations made on the land in pointing out the boundaries claimed by him, the last also being competent at common law.

At the trial of a petition for the registration of the title to certain land, a conveyancer who has examined the title to the land in question cannot be asked by the respondent whether or not in his opinion the petitioner can be said to have a good title to all the land included in the petition, or whether his record title is good only so far as it relates to the share or portion which belonged originally to a certain person, the question apparently calling for the opinion of the witness on questions of law as well as on incompetent questions of fact.

PETITION, filed in the Land Court on February 16, 1904, for the registration of the petitioner's alleged title to the westerly portion of Brier Neck, formerly called Salt Island Neck, in Gloucester.

The petitioner claimed under certain deeds and also by the adverse possession of himself and his predecessors in title. In the Land Court *Davis*, J. found for the petitioner, and the respondents appealed to the Superior Court. The issues framed in the Land Court by *Davis*, J. for the appeal were as follows:

"1. Is the land claimed by the petitioner the same land, in whole or in part, as that described in the deeds under which he claims to hold his record title?

"2. Has the petitioner any title to the land claimed by him in this case, either in whole or in part, acquired by prescription or adverse possession?

"3. If each of the preceding issues is answered in the negative, Is there a public highway by prescription over the westerly end of said land?"

There were other issues numbered 4 and 5, which were "allowed if material" and afterwards in the Superior Court with the consent of the parties were ruled to be immaterial. The third issue, quoted above, was answered by the jury in the affirmative by direction of the judge, all the parties having conceded the existence of such a way.

In the Superior Court the issues were tried before *Aiken*, C. J. The deeds referred to in the first issue consisted of a chain of deeds duly recorded, beginning with a deed of Eleazer Grover, administrator of the estate of Jeremiah Parsons, to Wil-

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liam Grover, dated September 30, 1776, and a deed of William Grover to Eleazer Grover of the same date, and running down to the petitioner.

Immediately after the opening for the petitioner, the counsel for the respondents asked the Chief Justice to rule that under the statutes the respondents were entitled to have all questions of fact tried by the jury, and were not limited to the questions raised by the issues framed by the associate judge of the Land Court.

The Chief Justice refused to rule as requested, and ruled that the only issues to be tried were those raised by the issues so framed, and the respondents excepted.

The rulings of the Chief Justice in regard to the admission and exclusion of evidence which were excepted to by the respondents are indicated sufficiently in the opinion.

The Chief Justice ordered the jury to answer the first issue in the affirmative, and the respondents took no exception to this ruling.

The second issue was submitted to the jury under instructions not excepted to, and the jury answered this issue in the affirmative.

The respondents alleged exceptions to the ruling of the Chief Justice that the questions of fact to be tried were limited to those raised by the issues framed by the judge of the Land Court, and to the rulings as to the admission and exclusion of evidence referred to above and in the opinion.

S. H. Tyng, J. A. Harris & E. M. Bennett, for the respondents.

H. T. Lummus & C. N. Barney, for the petitioner.

KNOWLTON, C. J. The exceptions presented by this bill were taken at a trial in the Superior Court, on an appeal from the Land Court upon a petition for the registration of a title. The questions at the trial were many and complicated, having reference to titles which the respective parties sought to establish under a grant from the town of Gloucester, made in 1707, of a neck of land lying on the sea. There was also a claim by adverse possession. The questions of law now to be considered are few and simple.

Immediately after the beginning of the trial the respondents asked the judge to rule that they were entitled to have all questions of fact tried by the jury, and were not limited to the ques-

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tions raised by the issues framed by the judge of the Land Court. The judge refused the ruling and the respondents excepted.

By the R. L. c. 128, § 13, as amended by the St. of 1902, c. 458, it is provided that, upon an appeal from the Court of Land Registration to the Superior Court, issues shall be framed in the Court of Land Registration. It also is provided that "no matters shall be tried in the Superior Court except those specified in the appeal." In the St. of 1904, c. 448, which enlarges the jurisdiction of the Court of Land Registration, and changes its name to the Land Court, there are the same provisions. The appeal provided for in this act is an "appeal for a jury trial on the facts." The St. of 1905, c. 288, makes all appeals from the Land Court to the Superior Court "appeals for a jury trial on the facts." It requires the judge of the Land Court, when such an appeal is taken, to file in the Superior Court a full report of his decision, and all the facts found by him, so far as they relate to any of the questions involved in the appeal, and makes his report *prima facie* evidence at the trial in the Superior Court. As no matters can be tried in the Superior Court except those specified in the appeal, and as the judge of the Land Court is to frame issues for the trial, a question arises whether, if these issues are found insufficient properly to present all the matters specified in the appeal, it is in the power of the Superior Court, on application of a party, to frame additional issues relating to the matters so specified. Although the statute is silent on this point, we think it would be too strict a rule to hold that there is no power in the Superior Court to modify or enlarge the issues, if it should plainly appear that they are not adequate properly to present the matters specified in the appeal. The statute requires the judge of the Land Court to frame these issues, because, from the trial of the case, he would be expected to know better than any one else what questions should be presented to a jury for the determination of the matters involved in the appeal. For this reason, we should expect that the Superior Court would not frame additional issues, or change the existing issues, except for very good reasons. But the appeal to the Superior Court leaves the Land Court with no power to allow amendments of the issues after the appeal is entered in

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the Superior Court, and as there is no prohibition of the Superior Court against allowing such amendments, we see no good reason for saying that the issues cannot be amended in the Superior Court. These issues are for the purpose of settling the matters specified in the appeal, and there should be power, at any time, to adapt them to these matters by a change of form if necessary.

On the other hand, the appeal states the whole case for a jury trial on the facts, and thus determines the jurisdiction of the Superior Court. By the express terms of the statute, the Superior Court can deal with no matters except those specified in the appeal.

As the appeal in the present case was, by its language, limited to the matters which appear in the issues filed with it for the trial in the Superior Court, the jurisdiction given by the appeal was no broader than the statement in the issues. The request for a ruling was therefore rightly refused.

The other exceptions all relate to questions of evidence. The testimony of the petitioner, that he paid $9,000 for the land, was a fact proper to be considered, as bearing on the question whether his possession was adverse, and under a claim of right. For the same reason proof that his predecessor in title and possession brought an action for trespass against the Gloucester Street Railway Company, for constructing its railway over a part of the land, was competent. So also was the testimony of this same predecessor that, while he held the land under a deed, he built a cottage upon it, which cost him about $1,200. See *Wishart* v. *McKnight*, 178 Mass. 356; *Jordan* v. *Riley*, 178 Mass. 524. Declarations of a former occupant of the property, now deceased, who then claimed under a deed, were testified to by different witnesses.* These were all competent under the R. L. c. 175, § 66. *Dixon* v. *New England Railroad*, 179 Mass. 242, 246. *Stocker* v. *Foster*, 178 Mass. 591, 602. Some of them were also admissible at common law. See *Daggett* v. *Shaw*, 5 Met. 223; *Wood* v. *Foster*, 8 Allen, 24.

The question put by the respondents to the conveyancer who

* Some of the declarations were made on the land by the former occupant, who was a predecessor in title of the plaintiff, in pointing out the boundaries claimed by him. Other declarations related to his occupation of the land.

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had examined this title, as to whether or not in his opinion "the petitioner could be said to have a good title to all the land included in the description in the petition or whether his record title is good only so far as it relates to the share or portion which belonged originally to Jeremiah Parsons," was rightly excluded. Seemingly it called for the opinion of the witness on questions of law, as well as on questions of fact, on neither of which was his opinion competent.

Exceptions overruled.

HENRY PELS AND COMPANY *vs.* MYER M. MILLEN & another.

Middlesex. February 26, 1906. — May 17, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, & SHELDON, JJ.

Equity Pleading and Practice, Appeal. *Equity Jurisdiction*, Equitable replevin.

On an appeal in equity where the testimony is largely oral and is conflicting, the findings of the trial judge are to stand unless they appear to be clearly wrong.

Evidence that the defendant had in his possession a certain machine belonging to the plaintiff and that when the plaintiff undertook to obtain possession of it by a writ of replevin the defendant concealed from the officer certain essential parts of the machine which had been taken from it by him so that the officer could not serve the writ properly, is sufficient to sustain a bill of equitable replevin under R. L. c. 159, § 8, cl. 1.

BILL IN EQUITY, filed June 26, 1905, under R. L. c. 159, § 8, cl. 1, by a corporation organized under the laws of the State of New York under the name Henry Pels and Company, against certain persons doing business as copartners under the name of the Cambridge Architectural Iron Works, to compel the redelivery of a certain machine alleged to have been detained from its owner, the plaintiff, and so secreted and withheld that it could not be replevied.

In the Superior Court the case was heard by *Sheldon*, J., who made a decree for the plaintiff granting the relief substantially as prayed for against the defendants Myer M. Millen and Joseph Millen, and ordered that the bill be dismissed as to one Chaderofsky, who was alleged in the bill to have been a copartner

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with the other defendants but was found by the judge not to have been such a partner.

The defendants Myer M. Millen and Joseph Millen appealed.

D. Stoneman, for the defendants.

G. F. Tucker & F. S. Harlow, for the plaintiff.

HAMMOND, J. There were three defendants named in the bill, but the trial judge found that the defendant firm consisted only of the defendants Myer M. Millen and Joseph Millen, and the final decree runs against them only. Hence we shall hereinafter use the word "defendants" as including only them.

The case is before us upon an appeal from the final decree for the plaintiff, the whole evidence being reported. By the contract as it originally stood, two machines were conditionally sold to the defendants on credit, the title to remain in the plaintiff corporation until fully paid for. Subsequently one of the machines was taken back by the plaintiff, and the other was kept in the shop of the defendants. At the trial it was contended by the defendants that this subsequent arrangement entirely annulled the old contract, and was a new contract between the plaintiff and the defendant Joseph Millen, by the terms of which there was an absolute sale of the machine then in the shop of the defendants to the said Joseph as an individual, and that in this new contract there was no stipulation that the title should remain in the vendor until paid for; and Joseph testified in support of this contention. On the other hand the plaintiff contended that the subsequent agreement did not result in the sale to the defendant Joseph of the machine kept, but that as to that machine the original contract remained as before, and the provision that the title should remain in the vendor until the machine was fully paid for still stood.

The evidence was largely oral and conflicting. The judge at the close stated that he was satisfied that the testimony of Mr. Maddaus, who testified in support of the plaintiff's contention, was true, and that the testimony of Joseph Millen was not true. In a case like this the rule is that, where the testimony is largely oral, the findings of the trial judge, who has an opportunity to see the witnesses, are to stand unless they appear to be clearly wrong. We have carefully examined the testimony and agree with the trial judge that the provision of the original contract

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with reference to the title to the machine which was not returned was never abrogated. Payments not having been made as required by the contract, the plaintiff corporation was entitled to the possession of the machine.

The evidence clearly shows that when the plaintiff undertook to obtain possession of it by a writ of replevin, the defendants concealed from the officer certain of the essential parts, which had been taken from it by them, so that he could not properly serve the writ; and further that they have continued to secrete and withhold these parts so that they cannot be replevied. The case therefore is clearly within R. L. c. 159, § 3, cl. 1.

Decree affirmed.

GEORGE R. FARWELL *vs.* CITY OF BOSTON.

Suffolk. March 6, 7, 1906. — May 17, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Constitutional Law, Attempted exercise by Legislature of judicial power. *Municipal Corporations. Veto. Boston. Words*, "Presented."

Where on a petition for damages under a special act providing for the abolition of a certain grade crossing this court has decided that the petitioner, a part of whose land was taken, is not entitled to damages for injury to his remaining land caused by the removal of the railroad, and a judgment has been entered on his petition in accordance with this decision, whether an act of the Legislature which was passed after the entry of such judgment giving damages for property injured by reason of the removal of the railroad in the abolition of the grade crossing in question, if it became operative, would be constitutional as applicable to the parties to this petition, *quaere*.

Under the provision of the charter of the city of Boston, St. 1854, c. 448, § 47, requiring that an ordinance, order, resolution or vote passed by the board of aldermen and the common council "shall be presented to the mayor," and if not "returned by the mayor within ten days after it shall have been presented, the same shall be in force," leaving a vote with a clerk in the mayor's office in the absence of the mayor is not a presentation to the mayor within the meaning of the charter.

The charter of the city of Boston, St. 1854, c. 448, § 47, provides that an ordinance, order, resolution or vote passed by the board of aldermen and the common council "shall be presented to the mayor," and if it "shall not be returned by the mayor within ten days after it shall have been presented, the same shall be in force." A vote accepting a certain act of the Legislature was passed by the board of aldermen and the common council of that city and on

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Friday, July 3, of the year in question a certified copy of the vote was delivered to a clerk in the office of the mayor who indorsed upon it a statement that it was received on that day. The mayor was not in his office and did not see the act and the vote until Monday, July 6. On July 14, the mayor returned the vote to the board of aldermen, in which it originated, with a message purporting to be a veto of the vote. A committee of the board of aldermen reported that "this veto was not returned to the board within the time required by law" and this report was accepted. *Held*, that the veto of the mayor was made in due season, the vote not having been presented to him until July 6.

PETITION, filed August 26, 1903, under St. 1903, c. 392, for damages to the property of the plaintiff by reason of the removal of the railroad of the Old Colony Railroad Company operated by the New York, New Haven and Hartford Railroad Company, in the abolition of the grade crossing at Dorchester Avenue in Boston under the provisions of St. 1897, c. 519.

The answer, after a general denial, alleged that the petitioner in June, 1899, brought a petition against the respondent for the same cause of action, that the case was heard before a jury and damages were awarded to the petitioner, and that the petitioner is not entitled to bring a new petition for the same cause of action.

In the Superior Court the case was heard by *Lawton*, J. The former petition, referred to in the answer, was filed in the Superior Court on June 12, 1899, to recover the value of the land of the petitioner taken in abolishing the grade crossing in question and also for damages to his remaining land caused by the removal of the railroad which was used by him in carrying on the business of a kindling wood manufacturer. That case, after being tried in the Superior Court, was reported to this court upon questions of law, and on February 26, 1902, by a decision reported in 180 Mass. 433, this court decided that the petitioner was entitled to no damages for the injury to his remaining land by the removal of the railroad.

On May 27, 1903, the Legislature passed St. 1903, c. 392, as follows:

"Section 1. The city of Boston shall be liable to pay to any person owning land abutting on the line of the New York, New Haven and Hartford Railroad Company, as the same was located prior to the abolition of the grade crossing on Dorchester avenue, and having railroad connection with such railroad, and whose

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land, or any part thereof, has been taken by said city for the purpose of constructing a highway, such damages to property as he has suffered by reason of the removal of the railroad and of the loss of his railroad connection therewith.

"Section 2. Such damages may be recovered on a petition brought within three months after the acceptance of this act as hereinafter provided, in the manner provided by law for the recovery of damages for land taken for the laying out of highways in the city of Boston.

"Section 3. This act shall take effect upon its acceptance by the city council of the city of Boston."

The facts relating to the question whether this act was accepted by the city of Boston are stated in the opinion.

The provision of the charter of the city of Boston, St. 1854, c. 448, § 47, referred to in the opinion, is in full as follows:

"Every ordinance, order, resolution, or vote, to which the concurrence of the board of aldermen and of the common council may be necessary, (except on a question of convention of the two branches,) and every order of either branch involving the expenditure of money, shall be presented to the mayor; if he approve thereof, he shall signify his approbation by signing the same; but if not, he shall return the same, with his objections, to the branch in which it originated, who shall enter the objections of the mayor at large on their records, and proceed to reconsider said ordinance, order, resolution, or vote; and if, after such reconsideration, two-thirds of the board of aldermen or common council, notwithstanding such objections, agree to pass the same, it shall, together with the objections, be sent to the other branch of the city council, (if it originally required concurrent action,) where it shall also be reconsidered, and if approved by two-thirds of the members present, it shall be in force; but in all cases the vote shall be determined by yeas and nays, and if such ordinance, order, resolution, or vote, shall not be returned by the mayor within ten days after it shall have been presented, the same shall be in force. But the veto power of the mayor shall not extend to the election of officers required by any law or ordinance to be chosen by the city council, in convention, or by concurrent action, unless expressly so provided therein."

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The respondent asked the judge to rule

1. That St. 1903, c. 392, is unconstitutional.

2. That the action of the mayor was a legal veto of the acceptance of the act.

The judge refused to make these rulings, and ordered that the case stand for trial, but being of the opinion that this interlocutory order ought to be determined by this court before further proceedings in the Superior Court, at the request of the petitioner he reported the case for such determination.

If this court should be of the opinion that St. 1903, c. 392, is unconstitutional, or that the action of the mayor was a legal veto of the acceptance of the act, the petition was to be dismissed; otherwise, the case was to stand for trial on its merits.

L. C. Southard, for the petitioner.

T. M. Babson, for the respondent.

LATHROP, J. This court having decided in *Farwell* v. *Boston*, 180 Mass. 433, that the petitioner was not entitled to compensation under the St. of 1897, c. 519, § 4, by reason of his access to a railroad being cut off, the Legislature passed the St. of 1903, c. 392, changing the rule of law laid down by the court, but making the act take effect upon its acceptance by the city council of the city of Boston.

The question of the constitutionality of the act is a delicate one, as judgment had been entered on the petition for damages originally filed by the petitioner; but it is unnecessary to consider this question.

The remaining question is whether the act was legally accepted by the city council of the city of Boston. The facts bearing upon this question are as follows:

On Monday, June 29, 1903, the board of aldermen of the city of Boston voted to accept the act; and on July 2, 1903, the common council of that city voted that the act be accepted in concurrence. On Friday, July 3, being the next day, the vote of acceptance duly certified was taken by the assistant city clerk to the office of the mayor, and there delivered into the hands of a clerk in the office, who indorsed upon it "Received July 3, 1903." The mayor was not then in his office, and did not see the act and vote until Monday, July 6, 1903.

On July 14, 1903, the mayor sent to the board of aldermen a

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communication purporting to be a veto of the vote. This communication was laid on the table in the board of aldermen, and on January 2, 1904, was taken from the table and referred to the committee on public improvements, which committee on the same day reported "that in the opinion of the committee this veto was not returned to the board within the time required by law and recommending that no further action be taken." This report was accepted, and reconsideration refused.

The charter of the city of Boston, St. 1854, c. 448, in § 47, requires an ordinance, order, resolution or vote to be presented to the mayor, and provides that if an ordinance, order, resolution or vote "shall not be returned by the mayor within ten days after it shall have been presented, the same shall be in force." The case of the petitioner rests upon the assumption that the mayor did not send in his veto within ten days after the vote was presented to him, as required by the charter. This depends upon the meaning of the word "presented." We are of opinion that leaving a vote with a clerk in the mayor's office in the absence of the mayor is not a presentation to him within the meaning of the charter.

This question arose in 1868, in regard to a similar provision in the Constitution of the Commonwealth, c. 1, § 1, art. 2, which reads as follows: "And in order to prevent unnecessary delays, if any bill or resolve shall not be returned by the governor within five days after it shall have been presented, the same shall have the force of a law." The bill in that case was sent on February 10 to the secretary of the Commonwealth with whom all bills had been left for presentation to the Governor for twenty years before. The Governor was absent from the Commonwealth, and returned on February 14. On February 19 he returned the bill to the House of Representatives with his objections thereto. The House of Representatives requested the opinion of the justices of this court as to whether the bill was a law. The opinion of the justices was to the effect that the bill had not been presented to the Governor until his return. It was said: "As the duty of revisal by the governor is a personal duty, with which he alone is intrusted when his chair is not vacant, it is necessary that the bill should be laid before him personally." *Opinion of the Justices*, 99 Mass. 636.

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We are of opinion that this reasoning is sound, and that it applies to the case before us. The veto of the mayor was made in due season, and the St. of 1903, c. 392, not having been accepted, the petition under the act is of no effect.

Petition dismissed.

ANNIE PEARLSTEIN, administratrix, *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

SAME *vs.* SAME.

ANTONY YELKIN *vs.* SAME.

Barnstable. March 12, 1906. — May 17, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Negligence. Railroad.

In actions respectively at common law and under R. L. c. 111, § 267, against a railroad company by the administratrix of the estate of one killed after conscious suffering by a heavy iron machine falling upon him while under the direction of the defendant's freight agent it was being unloaded from the cart of the intestate by the use of skids in an attempt to place it in a car of the defendant, evidence that an employee of the defendant, who was standing in the car holding a rope hitched to the machine with which he was expected to steady it and help to keep it in position, started to jump, dance and whistle and jerk the rope, but when told by an employee of the plaintiff's intestate to "stop" did not repeat these actions, and was pulling upon the rope at the time of the accident, is evidence for the jury of negligence of a servant of the defendant which will support a verdict in the action at common law for the injuries and conscious suffering of the plaintiff's intestate, but is not evidence of gross negligence of a servant of the defendant in the action under the statute and will not sustain a verdict for the plaintiff in such action.

If the driver and proprietor of a tip cart and his employee who is assisting him in transporting a heavy iron machine for shipment by freight on a railroad, by direction of the freight agent of the railroad company, attempt to deliver the machine directly at the freight car, the floor of which is two feet higher than the cart, instead of at the station platform which is on a level with the cart, and, while they are assisting the freight agent and his assistant in moving the machine on skids placed by the freight agent as a bridge from the cart to the car, the machine falls and injures them owing to the negligence of the servant of the railroad company assisting the freight agent, they can be found to have been in the exercise of due care and not to have assumed the risk of such an accident.

The facts, that a freight agent at a railroad station insisted on receiving a heavy iron machine directly into a freight car, the floor of which was two feet higher than the cart in which the machine was brought for delivery, instead of receiving

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it on the station platform which was of the same level as the cart, and that, as the freight agent and another servant of the railroad company, assisted by the proprietor of the cart and his employee, were attempting to move the machine on rollers upon skids placed by the freight agent as a bridge from the cart to the car, the machine fell and killed the proprietor of the cart after conscious suffering, even if they are evidence of negligence on the part of the freight agent which would sustain a verdict against the railroad company in an action at common law for the injuries and conscious suffering of the deceased, which was not passed upon, are not evidence of negligence of the freight agent greater than a mere want of ordinary care, and will not sustain a verdict against the railroad company in an action brought by the administratrix of the estate of the deceased under R. L. c. 111, § 267, for causing his death.

THREE ACTIONS OF TORT, the first action at common law by the administratrix of the estate of Max Pearlstein, the owner of a tip cart and two horses, for injuries and conscious suffering of the plaintiff's intestate caused by a heavy iron machine falling upon him while it was being unloaded from his cart in an attempt to place it in a freight car of the defendant, alleged to have been due to the negligence of the defendant in not supplying suitable appliances for shipping the machine and to the negligence of the defendant's servants and agents while engaged in such shipping, the second action by the same plaintiff as administratrix under R. L. c. 111, § 267, for the benefit of herself, as widow of the intestate, and his children, for causing his death by the same accident, and the third action at common law by Antony Yelkin, employed by Pearlstein, for personal injuries caused by the same accident. Writs dated March 8, 1905.

In the Superior Court the three cases were tried together before *Fessenden*, J. The material conclusions of fact warranted by the evidence are stated in the opinion.

The testimony of the plaintiff Yelkin was as follows:

"I live in Boston, I know Max Pearlstein, worked for him. I came from Russia about six years ago, I had known Max Pearlstein three or four years ago, Mr. Pearlstein was a junk man, I went around with him and did a little farming, he owned the horses and the tip cart, I remember November 26, 1904, Mr. Pearlstein was killed that day, we went in morning to Osterville to Mr. Crosby's to take a machine to West Barnstable for freight, we put it on the tip cart, then went to dinner and fed the horses, after dinner we went to West Barnstable with the

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machine, went to the freight house, we took it to the platform, I turned the horses around and backed up to the platform, the freight man [Hiller] came and said, 'That is the car for the machine,' and showed us the car in which to put the machine, Mr. Pearlstein said, 'I don't want to put it in the car; I want to put it on the platform,' the freight man said, 'I want you to put the machine into the car.' He said, 'I want you to turn the horses around and back up to the car and put the machine into the car.' I said, 'No, I can't do it.' I said, 'The big piece of iron weighs eight or nine hundred, and is pretty heavy, and there is not enough men here — just three men.' And he said, 'I will get you some rope.' The machine was about two and a half feet wide and about five or six feet long, the platform was just like the tip cart, just the same height when the tail-board was let down, then I turned horses around and backed up to the car and blocked the wheels, Mr. freight man told me to bring that ladder [skids], I picked the ladder up and put it on the cart and put it in the car, after I brought the ladder the freight man put the ladder in the car, and he bring two rollers, Max was pushing the rollers under the machine, I asked the freight man 'Have you got any rope in here?' and he said, 'No, I no got any rope'; and he went and got a rope and he tied up the machine with a rope — the freight man tied the rope in the car, around a rod next to the opposite door of the car, I did not see the place where it was tied; but I saw it was tied and the freight man tied it, I didn't see anybody else in the car, I didn't look, the freight man jumped from the car to see about his ladder and called the fellow who was all the time helping about jobs [Cook], told him to jump in the car and gave him this rope and said, 'You keep this,' when we started to move the machine he said to him, 'You hold the rope and pull.' The man that the freight man called I had seen before, taking barrels of cranberries and lifting them into the car, working for the railroad, came from another car. The freight man called him to help move the machine into the car. The floor of the car was about two feet higher than tip cart, about ten feet from car to tip cart, we started moving machine from tip cart on to the ladder, fellow in car holding rope, we had got it about half way up the ladder, about same distance from car and from cart, I said to him [freight

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man] 'we cannot push the machine; it is too high and there is not enough men' and he said 'push it.' But he told this fellow to stay in the car and keep the rope and pull, and we pushing the machine, and this fellow stayed in the car and pulled the rope, and started to jump, and dance and whistle, and stopped pulling the machine. And I said 'John, you keep the rope good. Do not play with the rope because the machine will fall down.' Well for three or four minutes the machine went, and then it fell down, and fell on this shoulder, and scraped my head, and I fell with the machine, and moved it four or five inches before it fell down. After I said 'stop, John' I started moving the machine and the next thing that happened, the machine fell and I with it. Pearlstein was standing at my back, the freight man and Crocker on the other side of ladder. Crocker came from Parker's store and was helping the freight man. I could not do anything for five or six weeks. I sat down for five or six minutes, it was dark to me, after the accident I saw Mr. Pearlstein at the machine, it was killing his head, he was taken into a store and in forty minutes was dead. The skid was about a foot and a half wide, the machine was a little wider than the skid. Pearlstein said, 'Tony, I can't get up. I have a broken leg.' He lived about forty minutes. I was struck by the machine and it made a scar on my head."

His cross-examination was as follows:

"We had two horses, we drove into the grounds near the station and near Parker's store, I did not know station agent or baggage master, nor assistant baggage master, saw a man on platform, Pearlstein said 'Where shall we put this machine?' the man asked 'Where is it going?' Pearlstein said 'It is going to Boston,' the man said 'It goes in that car right over there,' the cart was just about at the platform, and the freight man pointed at the car, the land was perfectly level, I or Pearlstein drove the horses over near the car and backed the cart up against the door of the car, at this time another railroad man was in another car arranging cranberries. The freight man brought the ladder alone, the freight man put the ladder on to the tailboard of the cart, and into the car, the freight man took the bar and bringing these two rollers and lift this machine and was pushing the rollers under the machine, I had two rollers in

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the wagon from Osterville, and a small piece of rope from Osterville, the freight man worked the machine ahead with the crowbar, he showed us everything to do, a boy * was in the car holding the rope, I and Max were on one side and Hiller and Crocker on the other side."

"*Q.* And you were all pushing, and this boy inside of the car was pulling on the rope? *A.* Yes.

"*Q.* Now, do you say he was jumping around, dancing and whistling and jerking on the rope? *A.* Yes, sir.

"*Q.* And you said to him 'Stop, John, what are you doing?' *A.* Yes.

"*Q.* 'Stop your dancing'? *A.* Yes, sir.

"*Q.* 'Stop your laughing'? *A.* Yes, sir.

"*Q.* And what did he do then, when you said 'Stop, John', did he stop? *A.* He stopped this time.

"*Q.* And this time he was dancing and laughing and jerking on the rope? *A.* Yes, sir.

"*Q.* And all the time you four men were trying to push this heavy machine up on to those skids? *A.* Yes, sir.

"I don't know what made the machine fall, I did not hear Cook or Hiller say, 'Look out,' I did not hear Pearlstein say to the crowd, 'All right,' 'all hands pull,' 'All right, go ahead,' or anything like that."

His re-direct examination was as follows:

"When we drove into the yard we drove up to the platform first, we saw the freight man as we drove in, the freight house is right in front, the car was on our left, we drove to the freight house, we turned our team around and saw the car, he told us he wanted us to put the machine in the car, and I told him we wanted some ladders."

In the first and third actions, at common law, the judge refused to order verdicts for the defendant, and refused to rule as requested by the defendant, that the plaintiff's intestate and the plaintiff Yelkin were not in the exercise of due care, that there was no sufficient evidence to warrant the jury in finding that the injury to the plaintiff's intestate and the plaintiff Yelkin occurred by reason of the negligence of the defendant, its ser-

* Cook was twenty-one years of age at the time of the trial, which was a little more than a year after the accident.

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vants or agents, and that the plaintiff's intestate and the plaintiff Yelkin knew the situation, knew the weight of the machine and knew the danger and voluntarily assumed the risk.

In the second action, under R. L. c. 111, § 267, the defendant asked the judge to order a verdict for the defendant, and to rule as follows:

1. That the plaintiff's intestate was not in the exercise of due care.

2. That there is no sufficient evidence to warrant the jury in finding that the death of the plaintiff's intestate occurred by reason of gross negligence of any of the defendant's servants or agents.

3. That the plaintiff's intestate knew the situation, knew the weight of the machine, and knew the danger and voluntarily assumed the risk.

The judge refused to make any of these rulings, and submitted the three cases to the jury, submitting also to the jury two special questions which they answered as follows:

"1. Was Max Pearlstein (or was Anthony Yelkin) in the exercise of due care?" The jury answered "Yes."

"2. Did Max Pearlstein (or did Anthony Yelkin) assume the risk?" The jury answered "No."

The jury returned a verdict for the plaintiff in each of the cases, in the first case in the sum of $250, in the second case in the sum of $2,000, and in the third case (Yelkin's) in the sum of $200. The defendant alleged exceptions in each case.

R. A. Hopkins, for the defendant.

L. Bryant, (*H. M. Hutchings* with him,) for the plaintiffs.

KNOWLTON, C. J. These actions were brought to recover damages caused by the falling of a heavy iron machine while it was being moved from the rear end of a two horse cart into a freight car at the defendant's railroad station. The intestate of the plaintiff in the first two actions survived less than an hour after the accident, and died from the effects of it. The plaintiff in the third action was injured, but not very seriously. There was much contradiction between the testimony of the plaintiff Yelkin and that of most of the other witnesses in regard to some of the circumstances preceding and attending the accident. From his testimony the jury might have found

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that one Cook, who was employed by the defendant in unloading freight at the station, was negligent in starting to jump, dance, and whistle and jerk the rope, while standing in the car holding a rope hitched to the machine with which he was expected to steady the machine and help to keep it in position. Although this testimony was contradicted by the other witnesses, the jury might have believed it, and have found that Cook's negligence was one of the causes of the accident.

This was enough to entitle the plaintiffs to go to the jury in the actions at common law, if there was evidence that Yelkin and the deceased Pearlstein were in the exercise of due care. They were engaged in the performance of their duty, as they understood it, and it cannot be held as matter of law that they were negligent, nor does it appear that they assumed the risk of such an accident. They were not in any relations of contract with the defendant, whereby the defendant was relieved from the duty of seeing that its servants exercised proper care in the work in which they were engaged, and it cannot be said as matter of law that they understood, appreciated and assumed the risk, especially the risk of Cook's negligence, if he was negligent.

It is not necessary to decide whether the jury would have been warranted in finding that Hiller, the freight agent, was negligent in choosing the place in which the machine should be delivered by Pearlstein, and accepted by the defendant, and in directing the manner of its delivery and acceptance. We think the evidence tends to show that these matters were determined by Hiller, and that Pearlstein and Yelkin were acting, in part at least, under his direction in trying to load the machine upon a freight car directly from the cart in which it was brought to the station. If it had been unloaded from the cart upon the platform the accident would have been less likely to happen. As there was evidence of negligence on the part of the defendant's servant Cook, this subject becomes unimportant in the two actions at common law, in which the exceptions must be overruled without reference to Hiller's conduct.

The action brought to recover for the death of Pearlstein stands on different grounds. To recover in this the plaintiff was bound to show negligence on the part of the corporation itself,

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or unfitness or gross negligence on the part of its servants. There was no evidence to sustain the averment that the corporation was negligent in failing to provide suitable apparatus and appliances for loading its freight, nor was there any evidence to show the unfitness of the defendant's servants for the work in which they were engaged.

We come, therefore, to the question whether there was evidence of gross negligence on the part of these servants. If the jury might have found that Hiller was negligent in attempting to receive the machine for the company upon the car, to which it was to be transferred from the cart by rolling it over the skids, called by some of the witnesses a ladder, there is no evidence that his negligence was greater than a mere want of ordinary care. The jury would not have been warranted in finding gross negligence on his part. There was no evidence of other negligence on the part of any of the defendant's servants, except that of Cook, to which we have referred. The plaintiff Yelkin was the only witness who testified to this, and, if we give full effect to all he said, Cook stopped his objectionable conduct before the accident, when Yelkin said "Stop, John", and did not repeat it. The evidence of this plaintiff, as well as that of the other witnesses, tends to show that Cook held the rope all the time, and was pulling upon it at the time of the accident. The testimony goes no further than to show that probably he did not pull upon it so effectively as he might have done. While the jury might have found that failure on his part to do his work to the best of his ability was one of the causes of the accident, we think they would not have been warranted in finding that he was guilty of gross negligence which caused the machine to fall. The difference in degree between ordinary negligence and gross negligence, recognized or created by the statute, is material, and cannot be ignored in the trial of cases. R. L. c. 111, § 267; c. 171, § 2. *Brennan* v. *Standard Oil Co.* 187 Mass. 876, 878. In the action founded on the death of Pearlstein there was no evidence to warrant a submission of the case to the jury, and the result is that in this action the exceptions are sustained. In the other two actions they are overruled.

So ordered.

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FRANK DUFFY *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Suffolk. March 12, 13, 1906. — May 17, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Negligence, Employer's liability. *Railroad.*

It is not evidence of negligence on the part of a superintendent of the repair shop of a railroad company, that before leaving certain workmen in charge of a pair of wheels of a locomotive engine attached to an axle which had been taken from an engine for repairs he had failed to provide something with which to block the wheels when the workmen wished to stop them or keep them in a particular position on a track, if it appears that the workmen in the shop were accustomed to use for blocking the wheels what they called "scrap", consisting of pieces of wood or board or anything that came handiest to put under a wheel to block it, and that anything would have done for the purpose at the time in question.

It is not the duty of a railroad company maintaining a repair shop for its locomotive engines, nor of its superintendent in charge of the shop, to warn a workman employed there as a helper to assist the engineer, that a pair of wheels of a locomotive engine attached to an axle, weighing about seven thousand pounds, which have been taken from the engine and are on a fall table in a pit used for the purpose of taking off wheels and replacing them, if put in motion on a track on the fall table cannot be stopped quickly and will have considerable momentum, and that it is unsafe for a workman after such wheels are thus in motion to take a position against a corner of a recess in a wall of the pit where a crank pin attached to the outside of one of the wheels may strike him.

TORT for personal injuries incurred by the plaintiff on February 9, 1901, while in the employ of the defendant in its repair shop at Norwood, by the rolling against him of a pair of driving wheels of a locomotive engine attached to an axle which had been taken from the engine for repairs and were on a fall table in a pit, the first count alleging a failure properly to warn and instruct the plaintiff concerning the risks and dangers of his employment, the second count alleging that the fall table was in a defective and unsafe condition, the third count alleging a defect in the ways, works or machinery of the defendant, the fourth count alleging negligence of a person in the service of the defendant exercising superintendence, whose sole or principal duty was that of superintendence, and the fifth count alleging negligence of a person who in the absence of the de-

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fendant's superintendent was acting as superintendent. Writ dated April 22, 1901.

At the trial in the Superior Court before *Sherman*, J. the following facts appeared, among many others:

The repair shop where the plaintiff worked was called the "setting up" shop. The work done in this shop consisted of all kinds of repair work on locomotives and the building of new engines. There were six pits in the building and there was a fall or drop table connected with one of these, which was run by some gearing, having a track that connected the fall table with the shop so that a locomotive could come from outside upon the fall table in the shop. It was "a nice, good, light shop all around there." On the fall table there was only one track which ran from the shop out to the turntable outside the building. The pit with the fall table was forty feet long, eight feet wide and eight feet deep. Its use was to take off wheels and put them on; an engine would be put upon the floor of the pit, the track being flush with the entrance from the outside; then the engine would be blocked up on a level with the floor, so that, when the wheels were taken off by reason of the dropping of the table, the engine would remain where it was.

Just before the plaintiff was sent to do the work at which he was hurt, Olson, the superintendent, gave him a job and he went around the shop looking for a scraper. The men that he asked said that they had none and told him to get an old file and take it up to the grindstone and file it, and that it would scrape the frame around the engine. He expected to scrape off the grease and rust with it. Then Olson came after him and told him to go over and assist Nash, the engineer, in putting the wheels on the engine. At that time Olson said, "Hello, Duffy, go over and give Nash a hand at the wheels on the engine"; that was all that was said. Then the plaintiff went over to the right hand side of the engine, facing toward Boston, and leaned up against it, that is, he lay up against the engine upon the right hand side of the pit where he was going to work to put the wheels on. One Bowen was there. Nash said to the plaintiff "Hello, Frank, come over here." When the plaintiff went over, Nash called over Bowen also and told the plaintiff to get down into the pit. The plaintiff got down into

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the pit as he was told, and Nash sent Bowen after the blocks. Bowen came back and said he could not get any blocks in the shop and Nash said, "Well this job must be done before dinner; come on out of here." The plaintiff described what happened then as follows: "So I went up on my wheel on the right hand side and she started and I had my right shoulder up against it and it come and it come and it come harder. It gave me one rap and I passed the wheel and it come against me and the sight left my eye." The plaintiff "was standing inside the rail; his right shoulder was up against the wheel, facing towards the wall."

The following also is from the testimony of the plaintiff:

"*Q.* Now, had you ever done anything before that in the way of moving or pushing or stopping the wheel of that kind? *A.* No, sir.

"*Q.* Had anybody explained to you or said anything to you rather in regard to the manner in which you should work at that wheel, in assisting the moving of the wheel? *A.* No, sir.

"*Q.* Have you stated all that Mr. Nash or Mr. Olson said to you in regard to that work of helping move the wheel? *A.* No, nobody told me anything about how to work.

"*Q.* Had you at any time before that noticed how they stopped the wheel or moved the wheel in particular? *A.* No, sir.

"*Q.* Up to that time had you learned from any source what a counterbalance was? *A.* I never knew what it was.

"*Q.* What its purpose was? *A.* No, sir.

"*Q.* Had you observed or had your attention been called in any way to the effect of a counterbalance on a wheel after the connecting rod had been taken away? *A.* No, sir.

"*Q.* Did you know anything about the machinery of a locomotive? *A.* No, sir.

"*Q.* Did you receive any instructions or information at all from Mr. Olson or from anybody else connected with the company and the company's work there as to the possibility of injury, the machinery, the working of the wheels, weight of the wheels, amount of force it required to control the wheels and the dangers to be guarded against in relation to the machinery and the wheels about there? *A.* No, sir."

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The following explanation of the accident is taken from the plaintiff's brief:

"At the time of the work in question, the crank pins were in these wheels, but the nuts and bolts and all the connecting rods had been removed from the crank pin. The crank pin extended over the platform on which the men worked so as to come within one and one half inches from the side of the pit, and on the other side of the platform was a pit in the fall table nineteen inches deep which was filled with water. On either side of the floor pit to a depth of eight feet there were side recesses or holes in the wall of the pit, sixteen by fourteen inches wide, where the screws go in to raise the whole table.

"The wheels in question were to be rolled from their position forward on the rails to the end of the pit under the body of the locomotive.

"At this time, owing to the removal of a part of the rods, bolts and nuts against which the counterbalance was weighted, the counterbalance operated as a separate weight at the rim of the wheel, so that when such weight passed over the top of the wheel in its motion forward and downward it operated as a force to accelerate the motion of the wheel, and it was this accelerated motion which caused the injury of the plaintiff. . . .

"The plaintiff, when the wheel came harder upon him, passed by the wheel and was caught by the crank pin and wedged into one of the recesses or holes in the wall, so that he stopped the wheel and was severely injured.

"Nash, the machinist, testified that when they got the wheels going the rear wheels started to follow the main wheels, and witness told Bowen, another helper, to get a block, and he ran back to do so. In the meantime the main wheels were running ahead, and the witness stood with his right shoulder against the left wheel. [The plaintiff was on the right hand wheel and did the same. The first thing the witness knew the plaintiff was hurt. The plaintiff was pinned there and almost slewed the wheels off the track.] The plaintiff was so firmly wedged into the recess in the wall that the eight or ten men could not move the wheels from him, and they were finally pried off by a bar."

Other material facts, including the method of blocking the wheels of locomotive engines in use in the shop and the weight

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of the wheels that injured the plaintiff, are stated in the opinion.

At the close of the plaintiff's evidence the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

G. F. Williams, (*H. D. Crowley* with him,) for the plaintiff.

J. L. Hall, (*F. W. Knowlton* with him,) for the defendant.

KNOWLTON, C. J. The question in this case is whether there was any evidence of negligence on the part of the defendant, or of its superintendent.

There was no evidence tending to support the second and third counts of the declaration, in each of which it is averred that the defendant's fall table was in a defective and unsafe condition.

It is contended that there was negligence on the part of Olson, the superintendent, in not providing something to block the locomotive wheels when the workmen wished to stop them or keep them in a particular position; but the testimony was undisputed that the workmen in this shop were accustomed to use what they called "scrap" to block the wheels, that is, pieces of wood, or board, or anything that came handiest, to put upon the track under the wheel to block it. The witness who testified on this point said that anything would have done just at that time. One Bowen had been sent by the machinist to bring something to use as a block, and, if there was any negligence in regard to this, it was the negligence of the machinist and the other men in moving the wheels without waiting for Bowen to return, and not the negligence of the superintendent, who was absent at the time.

The contention most relied on by the plaintiff is that there was negligence in failing to warn him of the danger of getting caught by the crank pin against the corner of one of the holes in the wall at the side of the pit.

It is not contended on the evidence that the construction of the pit was improper, or that any other mode of construction would have been better. It is not contended that, for the safety of an employee who had contracted to work there, the defendant was bound to change the construction of the fall table, or the pit, if another construction would have been safer. The contrary has been decided in many cases.

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It is contended that the danger from which the plaintiff suffered was a peculiar one, which, from observation of the place, he would not be expected to discover or anticipate, and which the defendant knew or ought to have known, so that it was the defendant's duty to warn him and instruct him how to avoid it. According to the testimony, the axle and the pair of wheels connected by it weighed about seven thousand pounds. A man of ordinary intelligence could not fail to know that such wheels would start slowly, and that when in motion they could not be stopped quickly. One would know from their size and weight that he could not safely allow them to move up and catch him between them and an immovable wall.

In each wheel there was a counterbalance, occupying a section that included about one eighth of its circumference, which was designed to balance the weight of the crank pin, and of the connecting rod that was attached to it. As the connecting rod had been taken off before the accident, the counterbalancing weight was greater than the weight of the crank pin and its bolts and attachments on the opposite side of the wheel, so that it had a tendency to increase the difficulty of stopping the wheel when its weight was on the part of the circumference that was descending. As the crank pins on the opposite wheels were set at different angles with a perpendicular line, the counterbalances on the two wheels were put on correspondingly different parts of the circumference, so that when one was descending, the other would be going, with the same revolutionary movement, at a point in a line one eighth of the circumference of the wheel away. While their combined effect upon the motion of the wheel was not so great as if both had been at the same point in the circumference, they appreciably affected it in some parts of the revolution. Although this was open to observation on looking at the wheels, whether a helper would be expected quickly to notice it we do not think very important in this case, for in any event he could not fail to know that such wheels, when in motion, would have considerable momentum, and he would be expected to know that it would be unsafe to take a position against a corner of one of the openings in the wall where the crank pin might strike him. Moreover, in moving wheels on

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this track that is not a position which one would be expected to take, even if there were no danger attending it.

The question is whether the defendant had reason to think that an ordinary person, set to work with several other men in moving locomotive wheels, was in serious danger of putting himself in this position while the wheel was rolling forward in a way that would be likely to bring it against him. Unless the defendant's superintendent would have reason to expect this, it was not his duty to warn the plaintiff in regard to it. We see no evidence that a superintendent should have anticipated a possible accident of this kind so as to make it his duty to give helpers instructions in regard to it. Everything in the situation was open, the place was well lighted, the forces involved were the ordinary forces of nature, operating in an ordinary way upon materials and objects with which, in their essential features, everybody is familiar.

We are of opinion that there was no evidence of negligence of the corporation or of its superintendent in failing to warn the plaintiff of the danger of such an accident as happened to him. See *Goldthwait* v. *Haverhill & Groveland Street Railway*, 160 Mass. 554; *Stuart* v. *West End Street Railway*, 163 Mass. 391; *Ciriack* v. *Merchants' Woolen Co.* 146 Mass. 182.

Exceptions overruled.

BEATRICE M. PRESTON *vs.* THOMAS A. HENSHAW & another.

Suffolk. March 15, 1906. — May 17, 1906.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Practice, Civil, Appeal.

Under R. L. c. 173, § 97, the right of appeal to the Superior Court from a judgment of a police, district or municipal court or trial justice in a civil action includes an appeal from a judgment rendered on an agreement in writing signed by the parties or their attorneys, and, if the validity of the agreement is called in question by one of the parties in whose behalf it is signed, he has a right to have his case considered and determined in the Superior Court.

Against the oral objection of the plaintiff in person an agreement of counsel was filed in a case in a municipal court that the entry might be made of "Judgment for the plaintiff in the sum of $75 without costs and judgment satisfied." After

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a hearing, in which the plaintiff was represented by new counsel, an entry was made of "Judgment for plaintiff for $75 without costs by agreement," and another entry was made of "Judgment satisfied." The plaintiff appealed to the Superior Court. *Held*, that under R. L. c. 173, § 97, the plaintiff had the right to appeal from the judgment, and on such appeal could show that the agreement for judgment was made without authority from him, and that he was entitled to a larger sum than the amount named; *held also*, that the entry "Judgment satisfied" was not a part of the judgment and had no effect on the plaintiff's right of appeal.

TORT for personal injuries from a fall on a sidewalk on Garden Street in Boston caused by ice formed thereon by reason of the alleged negligence of the defendants in allowing water to come upon the sidewalk from a spout or conductor leading from a building owned and controlled by them. Writ in the Municipal Court of the City of Boston dated March 24, 1904.

In the municipal court judgment was entered for the plaintiff in the sum of $75 without costs. The plaintiff appealed. In the Superior Court the defendants moved to dismiss the appeal. That court denied the motion and the defendants appealed.

The certificate of the amended record of the municipal court referred to in the opinion was as follows:

"Commonwealth of Massachusetts.

"Suffolk, ss.

"At the Municipal Court of the City of Boston, holden at said Boston, within the County of Suffolk, for civil business, on the twenty-seventh day of May, in the year of our Lord one thousand nine hundred and four.

Beatrice M. Preston, Plaintiff,

vs.

Thomas H. Henshaw et al., Heirs, Defendants,

tort.

"I hereby certify that the above entitled action was duly entered in said Court, on the twenty-third day of April, A. D., 1904.

"Declaration filed time of entry.

"Apr. 27, 1904. Defts. file Ans.

May 25, 1904. Agreement for judgment presented to Clerk for filing, and orally objected to by Plff. in person.

May 25, 1904. Wm. H. Sullivan Esq., appears for Plff.

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May 26, 1904. Agreet filed by leave of Court after hearing.
May 27, 1904. Judt. for Plff. for $75. — without costs by agreet.
May 27, 1904. Judt. satisfied.
May 27, 1904. Plff. appeals. Time for filing bond extended to and inc. June 2, 1904, by Brown, C. J.

"From which said judgment the said Plaintiff appealed to the Superior Court, and within the time allowed to wit: June 1, 1904 at 11.20 A. M. filed a bond with surety, to prosecute said appeal at said Superior Court, to be holden at said Boston, within and for the County of Suffolk, for the transaction of civil business, on the first Monday of June 1904.

"Orsino G. Sleeper, Clerk."

E. Greenhood, (*D. Benshimol* with him,) for the defendants.

P. M. Keating, (*W. H. Sullivan* with him,) for the plaintiff.

KNOWLTON, C. J. The only question argued upon this appeal is whether there was error of law in the refusal of the Superior Court to grant the defendants' motion to dismiss the plaintiff's appeal from the decision of the municipal court. This appeal was taken from a judgment in her favor for $75, rendered on an agreement of counsel filed in the case. This was an agreement that an entry might be made as follows: "Judgment for the plaintiff in the sum of $75 without costs and judgment satisfied." The amended record shows that, when the agreement for judgment was presented to the clerk for filing, the plaintiff orally objected to it, in person, and that she was afterwards represented by counsel other than the attorney who signed the agreement, and that after a hearing the agreement was filed by leave of court. On the following day there was an entry of "Judgment for plaintiff for $75 without costs by agreement", and another entry of "Judgment satisfied." From this judgment the plaintiff duly appealed.

Every party aggrieved by the judgment of a police, district or municipal court, or trial justice in a civil action, is given a right of appeal, in the broadest terms, by R. L. c. 173, § 97. This right relates as well to a judgment rendered on an agreement in writing, signed by the parties or their attorneys, as to one rendered upon a hearing upon issues founded on the pleadings. Of

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course if such an agreement is so made as to be binding, it will be given effect in the Superior Court, and the appeal will be ineffectual to change the result; but if the validity of the agreement is called in question by one of the signers of it, the aggrieved party has a right to have his case considered and decided in the Superior Court. In the present case the authority of the attorney to make such an agreement was denied by the plaintiff before the agreement was filed, and it is plain that the statute gave her a right of appeal from the judgment rendered for a sum less than that which she thought herself entitled to. *Powell* v. *Turner*, 139 Mass. 97. *Jaha* v. *Belleg*, 13 Allen, 78. *Emery* v. *Seavey*, 144 Mass. 403.

The entry of "Judgment satisfied" was not a part of the judgment of the court. It was an entry of record, to be used as evidence in case there was a question about the plaintiff's right afterwards to collect the judgment. This entry had no effect upon the plaintiff's right to appeal from the judgment itself. The motion to dismiss the appeal was denied rightly.

Judgment affirmed.

JOSEPH SULLIVAN, JR., *vs.* BOSTON ELEVATED RAILWAY COMPANY.

JOSEPH SULLIVAN *vs.* SAME.

Suffolk. March 15, 16, 1906. — May 17, 1906.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Negligence.

There is an age of a child, beyond that at which as matter of law he is incapable of exercising care and before reaching that at which as matter of law he is capable of exercising care, when, in an action by the child for personal injuries, it is a question of fact for the jury whether under the circumstances attending his injury he was incapable of exercising care so that no care on his part personally need be proved.

In an action for personal injuries by a child run over by a car of a street railway company, if it appears that the plaintiff was a boy four years and three months of age, a lively child, active and energetic, that the car was running on a city street at the rate of from fifteen to twenty miles an hour, that the plaintiff was crossing the street with another boy who was slightly older ahead of him, and

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that he walked at a "pretty lively gait" or trotted "at a fair little jog" into the forward fender of the car which ran over him, it is a question for the jury whether the plaintiff has shown that he was incapable of exercising care and so was not required to exercise it in crossing the street.

In an action by a child for personal injuries from being run over by a car of a street railway company, if it appears that the plaintiff was a boy four years and three months of age, a lively child, active and energetic, that the parents of the plaintiff with their three children occupied an apartment on the third floor of a house in which lived three families who used the hallway and front door in common, that it was a rainy day and the plaintiff's mother let him play in the hallway on the ground floor with another little boy who had come to play with him, that the mother was washing at a tub in a small kitchen opening into a small entry that led into the hallway on the third floor and that every few minutes she went about ten or twelve feet to the rail where she looked down to see the little boys, and she also could hear them at play while she was at the tub, that finally she missed them "because it was so quiet all of a sudden" and, after looking down and seeing they were not there, called to her husband to go down and see where the plaintiff was, that, while she was washing, her husband was in another room tending the baby who was sick, that the husband on going down learned that the plaintiff had gone with the other little boy out of the front door and had been run over by a car of the defendant, that the plaintiff's mother never allowed him to go out when it rained, that the father knew that the street outside was a dangerous place, that he heard the mother tell the boy to be sure and stay in the entry, and he told the boy not to go out of the entry on to the door steps, and did not think he would go out when he had told him not to, that "he was always a good boy to mind." *Held*, that the question whether the plaintiff's parents exercised due care was one of fact for the jury.

TWO ACTIONS OF TORT, the first by a boy, four years and three months old when injured, for personal injuries from being run over by a car of the defendant, and the second by the boy's father to recover for the loss of his services and for expenses resulting from the accident. Writs dated November 12, 1901.

In the Superior Court the cases were tried together before *Gaskill*, J.

One Moran, a witness for the plaintiffs, testified that he was looking out the window of a store on Dorchester Avenue, on September 18, 1901, the day of the accident; that he saw two boys, one of whom was the minor plaintiff, leave the sidewalk on the opposite side of the street and start directly across; that they were walking pretty lively; that the other boy was ahead; that they looked pretty close; that a north bound car was coming along at a high rate of speed, from sixteen to twenty miles an hour; that the fender of the car hit the child and knocked him over, and the rear truck ran over him and cut his leg off; that

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the witness did not know whether the forward truck ran over the boy, but certainly saw the hind truck go over his leg; that there was no other car in sight going either way; and that this car kept on to the next crossing, from two hundred to two hundred and twenty-five feet away.

One Bradley, a witness for the plaintiffs, testified that he was on Dorchester Avenue, going toward Mount Vernon Street; that he saw two little boys come around the corner of Mount Vernon Street and come running down Dorchester Avenue on the sidewalk; that after they got a little down the avenue they stepped from the curb to cross the street; that the car had then just crossed Mount Vernon Street, from one hundred and twenty-five to one hundred and thirty feet away; that he noticed the car coming and turned around to see how they were getting along; that he saw the boys going at a fair little jog; that the plaintiff crossed the nearer track and then was struck by the fender on the nearer side of the front; that he spun around and fell and went under the car; that the car was going at an awful rate of speed, from fifteen or twenty miles an hour; and that it did not slacken its speed from his first view of it until the boy was hit and did not stop until it reached Harvest Street.

Mary A. Sullivan, the mother of the boy, testified "that she lived at 36 Mount Vernon Street, which is the second building from the corner of Dorchester Avenue. They lived in the third story. Three families occupy the building and all use the same entrance. She had three children at the time of the accident. The oldest was six, the plaintiff was four years and three months, and the third child was twenty-one months younger than the plaintiff [two and a half years of age]. On September 18 it was raining. The baby was not very well. Her husband was at home. She was washing when the accident happened — washing at the tub — and her back was toward the door. The plaintiff had been playing in the house with Charlie Dunn, who had come in to play with him. They played around a little while and got tired and she allowed them to go down to the front entry in the lower story, which was a large, square place, where they were accustomed to play. She could see them and she could hear them all the time they were playing there. She left the tub every few minutes and went and looked down. She

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could look from the top of the stairs down in the front entry and hear them and see them play. She could hear them while she was at the tub. They were there fifteen or twenty minutes. During that time they had both come up and got a piece of bread and butter and then went down and played again, and the witness had gone to the top of the stairs and looked down and could see them and hear them playing. Finally she missed them and she called to his father to go down and see where the plaintiff was. It was not more than a couple of minutes, she believed, when, because it was so quiet all of a sudden, she missed them, not hearing them, and went and looked and they were not there. The door of her kitchen was open into the hallway. It was a very small kitchen which opened into a small entry and that opened into the hallway. It was perhaps ten or twelve feet from where she was washing to the rail where she looked over. She told her husband to go and see where the children were, but finally, not hearing him, wiped her hands and started to go down, and as she did met two of the neighbors coming to tell her about the accident. While she was washing, her husband was in the front room with the baby. She had given the children permission to stay in the entry and play. At that time the hall door was closed. The plaintiff was as large as any child of four years at that time."

On cross-examination she said "that the plaintiff was a lively child, active and energetic; that Charlie Dunn lived on Mount Vernon Street; that her husband hadn't anything to do that afternoon; it was his time off. He was going to work after supper. He was there in the house looking after the children and had nothing else to do. There were four rooms in their apartment. The front room overlooked the street and he was in that room. If you looked out the window you could look up and down the street but there was a stoop over the front door that prevented your seeing the steps. Charlie Dunn came in through the front hall door. It was 'uncatched.' It was not fastened. Any little boy could open it. Of course, it was just as easy for these little boys to get out as it was for Charlie Dunn to come in. She let them go down to the lower floor, knowing that the door was such that they could easily open it. She never allowed the plaintiff to go out when it rained. The

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door was such that they could easily get out if they escaped her observation for a moment. Charlie Dunn was an active boy, too. They were friends; they always played together when outdoors. Charlie Dunn lived on the other side of Mount Vernon Street. To get to his house they would have to go outside and cross the street. She had lived in that neighborhood eight years and three months. The baby was fussy. His teeth troubled him. He did not have to have the doctor or anything of that sort and the baby was up and dressed. Her husband could have stepped out or down the stairs. He was in the front room. It opened on the hallway. While she was busy with washing, her husband was in the front room with the door closed between him and the hallway. The front hall door where the boys were playing opened upon the street, so if they opened the door that Charlie Dunn opened when he came in they would be right out there, ready to go out on the street. It was not cold weather. The plaintiff was fully dressed, but not in the ordinary way for going out. He had on the same suit of clothes he wore every hot, sunshiny day to go out and play. He had a little jacket on because the entry was damp. If she was going to send him out on a wet day she would dress him in a coat. He had his cap on. He wore it most all the time in the house. At her washing tub she had a scrubbing board and was busy all that afternoon. It made very little noise; she could hear the children. She told her husband she would look after them. He was taking care of the other child and you can't neglect one to take care of others. They had lived in that neighborhood eight years and she knew there was a double line of electric car tracks on Dorchester Avenue. It was one of the main thoroughfares of the city and the cars passed there frequently. She did not send the plaintiff across because she thought it was dangerous. She thought it was dangerous because of the travel there and she knew well if he got out there he would be in danger. If he should disobey and go out the door she could not catch him without going down two flights of stairs. He never stayed out more than a couple of minutes at a time any time. She always lived on these stairs, going up and down on them, watching the children in the entry, to see they were safe, because any mother is always nervous; she always kept them under her eye."

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Joseph Sullivan, the father of the plaintiff in the first case and the plaintiff in the second case, testified "that on the day of the accident he was not working; he was at home; he stayed in the house all day. In the afternoon he was holding the baby in the front room. The baby wasn't well and he was rocking him. His wife was washing. At some time, his wife came in and spoke to him about the plaintiff. About five minutes before that he had seen the boy come up and get a piece of bread and butter, then he heard him going downstairs and did not see him again. Later, his wife came in and said she had missed the plaintiff and that he had better go down and see where he was. He was then about the centre of the room in a rocking chair, rocking in his arms the baby Frank. He went down cellar and did not find him, so he went out on the sidewalk and saw a crowd and learned that the plaintiff had been run over."

On cross-examination this witness said "the baby was sick with cramps and pains in his stomach and they gave him castoria; he was not holding the baby all the afternoon. The baby would lie down on the couch there. If the witness wanted to go out he could have gone out. The plaintiff did not want to go out on account of the child ailing. He knew the minor plaintiff was downstairs, and that Charlie Dunn had come to play with him and he knew that the front door was very seldom fastened and supposed a little boy could open it without difficulty and that his little boy was down there playing in the hall right near the front door. He knew that Dorchester Avenue was a dangerous place. He heard the mother tell the boy to be sure and stay in the entry. He told the boy not to go out of the entry on to the door steps. You don't know what a little child will do, but he was always a good boy to mind. He did not think he would go out when the witness had told him not to. The door of the front room where the witness was was ajar when the boys went down with their bread and butter and he hollered out to his son not to go out of the entry."

There were other witnesses for the plaintiffs. There were also witnesses for the defendant.

At the close of the evidence the defendant asked the judge to make the following rulings:

1. Upon all the evidence the plaintiff cannot recover.

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2. There is no sufficient evidence that the plaintiff was incapable of exercising due care.

3. There is no evidence that the plaintiff did exercise due care. On the contrary, his conduct shows lack of any care whatever.

4. There is no sufficient evidence of care on the part of the boy's parents.

The judge refused to make the first, second and fourth rulings requested, and submitted the cases to the jury. At the beginning of the charge the judge said:

"Well, in the first place you have got to consider the boy's age. That is one of the material things here. If that boy had been of an age, or was in fact of an age where he could appreciate the situation in which he was, was competent to exercise any degree of care for his own protection, then there is no evidence that he did exercise any care. So that, the first proposition being that the plaintiff must establish by a fair preponderance of the evidence that the boy was incompetent to exercise any care, you come to that as the first question."

The jury returned verdicts for the plaintiffs, in the first case in the sum of $12,000, and in the second case in the sum of $3,000. The defendant alleged exceptions.

C. F. Choate, Jr., for the defendant.

C. C. Johnson, for the plaintiffs.

LORING, J. 1. The defendant's contention in support of its second request for a ruling is that in a case where the minor child who is injured (after getting on the street in question without negligence on the part of his parents) has not exercised any care, the burden is on the plaintiff to prove that he was incapable of exercising any care; and that in the case at bar these plaintiffs did not sustain the burden of proving that fact; that in the case at bar that fact was left to conjecture and was not proved.

There doubtless is an age where the court can say as matter of law that a child cannot exercise any care under any circumstances. There also is an age where the court can say as matter of law that a minor is capable of exercising some care under circumstances like those in question. See in this connection *Collins* v. *South Boston Railroad*, 142 Mass. 301, 314. The

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limits of these two classes are not settled by our decisions. There are now and probably always will be cases where it fairly may be said (as it was said in the case at bar) that the child did not under the circumstances exercise any care, and yet it cannot be said as matter of law that an ordinarily prudent child of the age or having the capacity of the child in question (whichever is the correct statement) was capable or incapable of exercising care. Such cases must be left to the jury. In such cases the matter is not a matter of conjecture, and yet nothing more can be proved than was proved in the case at bar. In the case at bar it was proved that the plaintiff in question was "a lively child, active and energetic," four years and three months old. The circumstances calling for the exercise of care on his part were these: The accident happened on one of the main thoroughfares of Boston, on which the defendant had a double track, surface railway, (and if the plaintiff's evidence was to be believed) a car was running from fifteen to twenty miles an hour. This boy, while crossing this thoroughfare, walked at a "pretty lively" gait, or trotted "at a fair little jog" into the forward fender of the defendant's car. At the time he was behind another boy, who was slightly older. This made out a case for the jury. See in this connection *Wright* v. *Malden & Melrose Railroad*, 4 Allen, 283; *Munn* v. *Reed*, 4 Allen, 431; *Callahan* v. *Bean*, 9 Allen, 401; *Lynch* v. *Smith*, 104 Mass. 52; *Gibbons* v. *Williams*, 135 Mass. 333; *O'Connor* v. *Boston & Lowell Railroad*, 135 Mass. 352; *McGeary* v. *Eastern Railroad*, 135 Mass. 363; *Marsland* v. *Murray*, 148 Mass. 91; *Slattery* v. *O'Connell*, 153 Mass. 94; *Creed* v. *Kendall*, 156 Mass. 291; *Grant* v. *Fitchburg*, 160 Mass. 16; *Powers* v. *Quincy & Boston Street Railway*, 163 Mass. 5; *Hewitt* v. *Taunton Street Railway*, 167 Mass. 483; *McNeil* v. *Boston Ice Co.* 173 Mass. 570; *Butler* v. *New York, New Haven, & Hartford Railroad*, 177 Mass. 191; *Walsh* v. *Loorem*, 180 Mass. 18; *Cotter* v. *Lynn & Boston Railroad*, 180 Mass. 145.

2. We are also of opinion that the question of the parents' negligence was for the jury.

The difficulty with the argument of the defendant's counsel here is that he has not told us what more (in his opinion) the parents were as matter of law called upon to do. Since the day

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was a rainy one, we cannot say as matter of law that it was not proper to keep the minor plaintiff in the house. Under the circumstances the lower hall cannot be said to be an improper place for the boys to play in although the front door was not locked. The front door was the common door of all three apartments and so not within the control of the boy's parents. Neither can we say that the mother ought to have left her washing to stand over the boys while playing, and the same is true as to the father, who was to go to work after supper and who was spending what was his night looking after the sick baby two and a half years of age. It is to be noted that on the uncontradicted testimony the boy "was always a good boy to mind," and was cautioned by both father and mother not to leave the entry; and also that within two minutes after the noise of their play ceased the father started to look for the boys, on being asked to do so by the mother who had kept herself where she could hear, and where, by going ten or twelve feet to the rail, she could look down and see them while they played in the entry. *McGeary* v. *Eastern Railroad*, 135 Mass. 363. *Marsland* v. *Murray*, 148 Mass. 91. *Slattery* v. *O'Connell*, 153 Mass. 94. *Creed* v. *Kendall*, 156 Mass. 291. *Powers* v. *Quincy & Boston Street Railway*, 163 Mass. 5. *Hewitt* v. *Taunton Street Railway*, 167 Mass. 483. *McNeil* v. *Boston Ice Co.* 173 Mass. 570. *Butler* v. *New York, New Haven, & Hartford Railroad*, 177 Mass. 191. *Walsh* v. *Loorem*, 180 Mass. 18. *Cotter* v. *Lynn & Boston Railroad*, 180 Mass. 145. *O'Brien* v. *Hudner*, 182 Mass. 381. *Mellen* v. *Old Colony Street Railway*, 184 Mass. 399.

Exceptions overruled.

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LEONARD J. TEPPER *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. March 16, 1906. — May 17, 1906.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Negligence. Street Railway. United States Mail. Practice, Civil, Exceptions.

Although a street railway company in operating a postal car carrying the United States mail is required to exercise the same degree of care toward travellers on the highway as in operating other cars on the streets, it is not error for the presiding judge at the trial of an action for personal injuries caused by a collision with such a car, after giving proper instructions as to the due care of the plaintiff and the negligence of the defendant, to call the attention of the jury to the provision of U. S. Rev. Sts. § 8995, making it a criminal offence knowingly to obstruct or retard the passage of the mail, and by way of illustration of the comparative rights of carriers of mail to refer to the provisions of R. L. c. 16, § 143, in regard to the right of way in the streets of "United States forces or troops, or any portion of the militia parading or performing any duty according to law," providing that the carriage of the United States mail shall not be interfered with; and, if the plaintiff has testified that he did not know that the car with which he came in collision was a mail car, this does not make this portion of the charge inapplicable to the case if the plaintiff also has testified that he saw the car while at a distance of one hundred and forty feet from him before he turned to cross the defendant's track, as the jury may believe in spite of the plaintiff's testimony to the contrary that he knew the car to be a mail car.

In an action against a street railway company for personal injuries from a collision with a postal car owned and operated by the defendant engaged in carrying the United States mail, if the judge in his charge has commented on the character of the postal service and the plaintiff, who has testified that he did not know the car to be a mail car, is apprehensive that this testimony has been overlooked by the judge, he should call his attention to the matter and make this the ground of a specific objection to the charge or a request for further instructions, and in the absence of such objection or request he has no ground for exception if the jury find for the defendant.

TORT by the driver of a delivery wagon in the employ of a meat and provision dealer for personal injuries caused by a collision with a car of the defendant shortly after nine o'clock on the morning of March 2, 1900, on Washington Street in Boston at or near the corner of Acton Street. Writ dated March 31, 1900.

In the Superior Court the case was tried before *Fessenden*, J.

Among other evidence there was evidence tending to show that the defendant at the time of the accident had entered into a contract to carry the United States mail; that the car which came

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into collision with the plaintiff's team was what is known as a mail or postal car, and that at the time of the accident mail was being carried by the defendant in the car. The plaintiff testified that he did not know that it was a mail car until after the time of the collision. The jury took a view of Washington Street at the point where the accident occurred, and also took a view of the mail car which came into collision with the plaintiff's team.

At the close of the evidence the defendant, among other requests, asked the judge to rule as follows:

"This car was exclusively engaged in carrying United States mail and for that reason had the superior right of way in the street over the team driven by the plaintiff and the plaintiff was bound to give the car an unobstructed and clear opportunity to pass without attempting to cross in front of it, as and when he did so attempt."

The judge refused to make this ruling. After instructing the jury that the plaintiff must prove that he was in the exercise of due care and that the motorman of the defendant was negligent, the judge charged the jury in regard to the subject of the foregoing request as follows:

"In order to determine this, gentlemen, [the due care of the plaintiff and the negligence of the motorman] you must get at the circumstances of the case. These are very simple, very plain, very easy to understand. The motorman was upon this United States mail car, bound to take the car through the streets with all reasonable speed, confined to the tracks in the street, and could not go in any other way; had a car which he had a right to drive, a car which must be driven by this, and was being driven by this electric power. You will not require impossibilities of the motorman, but he is bound to exercise care when he is driving the car through the streets. He is not driving a car in which passengers are being carried. You do not have that question to deal with. It is not a question of the care of the person or of the corporation with reference to passengers. It is the care with reference to people on the street. The plaintiff was driving along the street. The plaintiff had the right to drive along the street and, exercising proper care, having regard to all the circumstances, he had a right to cross the street. He had a right to cross the tracks of the defendant company.

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"The defendant apparently, there seems to be no question about this, had a contract with the United States government to carry mail, to carry the United States mail matter. That would give certain special rights under certain circumstances, to the United States government and to those persons employed in carrying the mail. No person can interfere or obstruct or hinder the passage of the mail. It is a penal offence under the laws of the United States for any one knowingly to do so.

"There is another situation, set of circumstances, which may throw a little light, although it may perhaps be very little, upon the matter under consideration. You all of you know that the troops have to parade in the streets at times, the United States troops march through here. We have had them come over from the Charlestown Navy Yard sometimes. Then the State militia is called upon at times to march through the streets. Ordinarily they have the right of way over everything, as it is called. Under our statutes the militia and these people have the right of way. But they cannot interfere in such a way as to obstruct or hinder the passage of the United States mail or the fire department, an engine going to a fire. You can understand matters of that sort, suppose there is a fire, an engine on its way to the fire, the militia or the United States troops have no right to hinder or to obstruct. So no one has the right to hinder or delay or obstruct the passage of those engaged in carrying the United States mail. This does not however, gentlemen, mean that the United States mail carriers may occupy exclusively the street. They are to do it considering all the circumstances, they are to do it in a proper way. This car had a right to go along the street. It has a right to go along the streets and no one had a right to hinder or obstruct or oppose it. But it does not mean because of that, that no one has a right to cross the street under any and all circumstances. It means simply this, that persons have no right to use the street in such a way as to obstruct, hinder or delay the passage of the car. That is all it means.

"Now, having that in mind, keeping in mind that the United States mail carriers have this privilege, what were the circumstances then? Did the motorman who was then engaged in carrying the United States mail, did he act in an unreasonable way? Did he conduct himself in such a way that you would say

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that he did not, considering the privilege of carrying the mail and the rights involved, that he did not exercise proper care? That is a very simple question for you to answer. The defendant says he did. That he did everything that a motorman could have done under such circumstances and did more than to exercise proper care, that he exercised a very high degree of care, that the circumstances of the accident were such as to show that there was no fault to be attached to him.

"That is the position of the defendant. It is not for the defendant to prove this. It is for the plaintiff to prove that the motorman did not act with proper care. The plaintiff says that he did not. That he did not stop his car quickly enough, that he did not get it under control quickly enough. These matters will be for your determination, I can express no opinion about them."

After further instructions in regard to the due care of the plaintiff, and after referring to certain evidence in regard to the condition of the car after the collision, the judge concluded his charge upon the question of liability as follows:

"After all, the question is was the motorman in the exercise of due care, or rather is it shown that he was not in the exercise of a proper degree of care, and the second question as to whether the plaintiff himself was in the exercise of a proper degree of care."

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

E. R. Anderson, (*A. T. Smith* with him,) for the plaintiff.

W. B. Farr, for the defendant.

SHELDON, J. The only question raised in this case is upon the plaintiff's exception to the instructions given to the jury with reference to the conceded fact that the car which came into collision with the plaintiff's team was a mail or postal car engaged in carrying United States mail. At the close of the evidence the defendant asked the judge to rule in substance that the plaintiff had no right to attempt to pass in front of this car. The judge declined to give this ruling, but did instruct the jury, among other things, that in order to determine the question of the plaintiff's care and the motorman's negligence, they must get at the circumstances of the case, and added the particular state-

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ments which are set out in the bill of exceptions. It is not denied that on the evidence the usual issues of due care and negligence were for the jury.

The plaintiff contends that the instructions given practically amounted to saying that the United States mail cars, so far as their operation is concerned, have some peculiar rights in the streets, and that a less degree of care may be exercised in running them than in running other cars on the street. But no such statement as this is found in the charge, and we do not think that the jury could have so understood it. The statement that no person could interfere with or obstruct or hinder the passage of the mail, that it would be a penal offence under the laws of the United States for any one knowingly to do so, was not in itself incorrect. *United States* v. *Thomas*, 55 Fed. Rep. 380. It is provided by statute that "any person who shall knowingly and wilfully obstruct or retard the passage of the mail, or any carriage, horse, driver, or carrier carrying the same, shall, for every such offence, be punishable by a fine." U. S. Rev. Sts. § 3995. The plaintiff objects that the statute applies only to persons who knowingly and wilfully obstruct or retard the passage of the mail or its carrier, that is, to those who know that the acts performed will have that effect and perform them with the intention that such shall be their operation, *United States* v. *Kirby*, 7 Wall. 482, 487, and argues that this part of the charge was inapplicable to the case because the plaintiff testified without contradiction that he did not know that this was a mail car. But by using the word "knowingly" the judge added the very qualification on which the plaintiff now insists; and in view of the plaintiff's testimony that he saw the car while at a distance of one hundred and forty feet from him and before he turned to cross the defendant's track, the jury might have believed, in spite of his own testimony to the contrary, that he knew this to be a mail car.

The illustration in the charge as to the comparative rights of the carriers of mail and of United States forces and troops in passing through the streets did not go further than the provisions of our statute. "United States forces or troops, or any portion of the militia parading or performing any duty according to law, shall have the right of way in any street or highway through

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which they may pass, provided the carriage of the United States mails, the legitimate functions of the police, and the progress and operations of fire engines and fire departments shall not be interfered with thereby." R. L. c. 16, § 143. St. 1893, c. 367, § 120. Moreover, this was given simply as an illustration, a circumstance which might throw some little light upon the matter under consideration. And the judge finally left, in unmistakable language, the whole conduct of both the plaintiff and the motorman to the jury, for them to determine as to the negligence or due care of each.

Taking all the language of the judge into consideration, we do not think that it could have misled the jury, as the plaintiff contends, into believing that the motorman had the right to run his car through the streets in a different manner from any other car, or without regard for the safety of the people upon the streets. The effect could not have been greater than to call the attention of the jury to the statute, and to instruct them that both the plaintiff and the motorman were bound to act, and that each of them had a right to expect the other to act, with regard to its provisions. If the plaintiff was apprehensive that his testimony that he did not know this to be a mail car had been overlooked, he should have called the attention of the judge to this matter. In the absence of any specific objection to the charge or of any request for further instructions, we are of opinion that the present exception cannot be sustained. *Dixon* v. *New England Railroad*, 179 Mass. 242, 249. *McKee* v. *Tourtellotte*, 167 Mass. 69.

Exceptions overruled.

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CHARLES E. HALL *vs.* CHARLES REINHERZ.

Suffolk. March 16, 1906. — May 17, 1906.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Evidence, Declarations of deceased persons. *Statute.*

A declaration of a deceased person otherwise admissible under St. 1898, c. 535, now R. L. c. 175, § 66, is not to be excluded because it was made before the passage of that statute.

A declaration of a deceased person otherwise admissible under R. L. c. 175, § 66, is not to be excluded because in the form of a statement in writing signed by the declarant.

R. L. c. 175, § 66, providing that a declaration of a deceased person shall not be excluded as hearsay if the court finds that it was made in good faith before the commencement of the action and upon the personal knowledge of the declarant, is remedial in its nature and should be construed liberally so as to extend rather than restrict its application.

BRALEY, J. This is an action of tort to recover damages for the alleged seduction of Margaret Moakler, a minor, and member of the plaintiff's family, to whom he sustained the relation of a foster parent. In the Superior Court a verdict was returned in favor of the defendant, and the plaintiff comes to this court on a report in which the only question of law presented relates to the exclusion of certain evidence offered at the trial. The party seduced having died on August 17, 1898, the plaintiff offered in evidence a written statement signed by her on July 8, 1893, in which she fully narrated her acquaintance and relations with the defendant, including their alleged illicit intercourse, and his subsequent conduct coercing her to submit to a criminal operation for the purpose of procuring an abortion from the effects of which she became a helpless invalid. There were other statements in connection with their general relations that are not important. The presiding judge states that he excluded this evidence solely because, that while otherwise he deemed it competent, in his opinion it was incompetent as the declarations were made before the St. of 1898, c. 535, now R. L. c. 175, § 66. The purpose of this statute was partially to remove the restrictions excluding hearsay evidence, and to permit its introduction when the declarations were made in good faith by a deceased

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person before the commencement of the action, but who if living would have been a competent witness at the trial. *Brooks* v. *Holden*, 175 Mass. 137. *Mulhall* v. *Fallon*, 176 Mass. 266. *Stocker* v. *Foster*, 178 Mass. 591. *Dixon* v. *New England Railroad*, 179 Mass. 242. *Dickinson* v. *Boston*, 188 Mass. 595. *Gray* v. *Kelley*, 190 Mass. 184. Neither are such declarations rendered inadmissible because instead of being oral they are put by the declarant in the form of a written statement. *O'Driscoll* v. *Lynn & Boston Railroad*, 180 Mass. 187. The statute relates to civil procedure only, is remedial in its nature, and therefore should be liberally construed to extend rather than restrict the remedy, and as the declarations offered come within its provisions they were admissible, although their publication preceded the passage of the original act. *Hewitt* v. *Wilcox*, 1 Met. 154. *Holmes* v. *Hunt*, 122 Mass. 505, 518, 519. *Danforth* v. *Groton Water Co.* 178 Mass. 472. *Rogers* v. *Nichols*, 186 Mass. 440, 443.

According to the terms of the report the verdict must be set aside, and a new trial granted.

So ordered.

J. W. Pickering, for the plaintiff, submitted a brief.

W. Charak, for the defendant.

OWEN MEHAN & another *vs.* LOWELL ELECTRIC LIGHT CORPORATION.

Middlesex. March 16, 1906. — May 17, 1906.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Negligence, Employer's liability, *Res ipsa loquitur*. *Electric Light Company.*

In an action under R. L. c. 106, § 73, by the next of kin of an employee of an electric light corporation against the corporation for causing his instant death, there was evidence that the deceased was an oiler whose ordinary duties were to oil and clean the engines in the engine room of the power house of the defendant under the direction of the engineer, that on a shelf about two feet from the level of the engine room floor were instruments called regulators, the purpose of which was to increase or diminish the amount of the current sent out over the lines, and which were connected with a switchboard which was on a

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platform above the regulators eight or ten feet high reached by steps from the engine room floor, that the passage from the engine room floor to the regulator shelf was closed by two parallel iron bars one end of each of which was supported in a socket in the brick wall of the building and the other end in a socket screwed to a wooden post near one of the iron posts that supported the framework of the switchboard platform, this iron post being about three inches from the engine room floor and separated from it by the bars, that a passage to the regulator shelf could be opened by unscrewing the bars from the sockets at one end and pushing them through the sockets attached to the wooden post which supported them at the other end, that the regulators and the switchboard were in charge of the defendant's electrician, that while the electrician, the engineer and the deceased were on the engine room floor, there came a loud report and a flash, that one of the regulators was smoking, that a little flame coming out of one corner of it was on the chain cable leading to its side, and that the tape insulation was burning, that the deceased immediately rushed to the bar that had to be unscrewed and pushed through the socket before the electrician could get into the electrical enclosure to put out the fire, that the engineer after seeing to the engine followed, and all three men then took part in unscrewing and pushing aside the upper bar and thus enabled the electrician to step over the lower bar into the space where the regulators were, that he stepped through with a pail of sand in one hand and a scoop in the other and was scooping up the sand, when the deceased in some way came in contact with the iron post and was instantly killed by an electric current passing through his body. The engineer testified that in case of fire it was the duty of the deceased to assist in putting it out if possible, and the electrician testified that there was a fire four or five weeks earlier which he assisted in putting out, and that the engineer and the deceased were there assisting. *Held*, that the jury were warranted in finding that the emergency justified and required the deceased to be where he was, and in finding that he was in the exercise of due care.

It is evidence of negligence on the part of an electric light corporation, that, after having knowledge from the fact that electric shocks were received by masons at work in the basement of its building that its system in use for carrying off superfluous electricity was not working properly and that electricity had found its way into the iron framework in the building, it continued on the next day to use the same system without change and without giving notice to its employees of the danger of receiving a charge of electricity on coming in contact with the iron work.

Semble, that the fact, that a workman employed to oil machinery in the power house of an electric light company on coming in contact with an iron post in the building was killed by a charge of electricity, is not in itself evidence of negligence on the part of his employer.

To entitle the next of kin of an unmarried employee to recover against his employer under R. L. c. 106, § 73, for causing his instant death, on the ground that the plaintiffs at the time of his death were dependent upon his wages for support, it is enough to show partial dependence.

In an action under R. L. c. 106, § 73, by the father and mother of an unmarried son against his employer for alleged negligence causing his instant death, brought as the next of kin of the deceased, "who, at the time of his death, were dependent upon his wages for support," it appeared that the family before the death of the deceased consisted of the plaintiffs with their two daughters, the deceased and another son, that the father was seventy and the wife sixty years of age, that the father earned certain money from time to time but had no regular

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work for all the year, that the mother was not very well and sometimes could not perform household duties, that the younger daughter had not worked for two years but stayed at home and helped her mother in conducting the household, that the other daughter worked for regular wages, that the other son now surviving, who was a student in a medical school, lived at home but otherwise supported himself, contributing nothing to the support of the family and receiving nothing except his lodging and meals, that the son who was killed received $12 a week which he handed to his mother, that the father kept as pocket money $2 a week, and that his remaining wages, those of the working daughter and those of the deceased son, in all about $24 a week, were given to the mother for the support of the family of six, and the personal expenses of all but the son in the medical school, that after the death of the deceased the family continued to live in the same house and to pay the same rent, and the mother testified that they had "plenty to eat and drink and wear." It appeared that since the death of the son the working daughter had had a slight increase of pay. *Held*, that the evidence warranted a finding that the plaintiffs were dependent, at least in part, on the son who was killed, and were entitled to maintain the action as his next of kin dependent upon his wages for support within the meaning of the statute.

TORT under R. L. c. 106, § 73, by Owen Mehan and Jane E. Mehan as dependent next of kin to recover damages for the death of their son Frederick C. Mehan. Writ dated December 8, 1904.

At the trial in the Superior Court before *Bell*, J. the following facts among others appeared:

Due notice of the time, place and cause of the accident was given to the defendant. The defendant was engaged in the business of furnishing electricity for light, heat and power, having a central station or power house on Perry Street, in Lowell. The deceased was an oiler who had been in the employ of the defendant about a year and a half, and his ordinary duties were to oil and clean the engines in the engine room of the power house under the direction of the engineer or assistant engineer. There were three oilers who alternated in the performance of these duties except when all the engines were running when they all were on duty. There were seven engines on the second floor of the power house, all operated by steam. On the easterly side of the engine floor, placed upon a shelf about two feet from the level of the floor, were eleven regulators, so called, placed in a row about one foot apart. Above these regulators was a platform some eight or ten feet high reached by steps from the engine floor, and upon this platform were situated the switchboard connected with what is known as the alternating circuit

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and the other instruments connected therewith. The purpose of the regulators was to increase or diminish the amount of the current sent out over the lines, and they were connected by wires with the switchboard and with the dynamos by which the power was produced. The regulators were box-like in shape, being about two feet high ordinarily and about fourteen inches across the face, the casing being of iron or steel. The switchboard platform or gallery above described was supported on an iron frame resting upon iron posts at each corner, which stood upon separate brick pillars which were embedded in cement foundations in the cellar beneath. The defendant's evidence tended to show that connected with this iron frame was an artificial "ground," as it is called, which consisted of a copper wire attached to the iron frame and leading down into the ground in the cellar, where at a depth of about six feet it was connected with a copper plate embedded in charcoal. The object of this ground was to lead off into the earth any current of electricity which accidentally might get on the iron frame or the posts connected with it. At the southerly end of the row of regulators above described and about three feet distant from that end was No. 7 engine, near which the accident occurred. Across the southern end of the regulator shelf and of that part of the room where the regulators were situated ran two parallel iron bars, one about eighteen inches high and another about three feet high and about eight feet long. One end of each of these bars was supported in a socket in the brick wall of the building and the other end in a socket screwed to a wooden post near one of the iron posts above described. These bars closed the passage between the platform or shelf where the regulators were situated and the engine floor, but a passage could be opened by disconnecting the bars from the socket at one end and pushing them through the sockets attached to the wooden post which supported them at the other end. The post, the touching of which caused the accident, was in the enclosure where the regulators were and was separated by about three inches from the engine floor by the bars above described. The jury took a view of the premises, and at the trial a floor plan of the engine room and six photographs were used. The accident occurred on December 11, 1903, at 6.45 A. M. It was admitted at the trial that the de-

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ceased was instantly killed and died without conscious suffering. His death was caused by coming in contact with the iron post mentioned above, and receiving from it a shock of electricity.

On the engine room floor around No. 7 engine was a leaden mat. This mat was electrically connected with the framework of the engine, which in turn was electrically connected by steam pipes with the boilers in the power station and these boilers were in turn electrically connected with the water mains of the city of Lowell. This grounding of the leaden mat and the engine to the city water mains was necessarily occasioned by their construction and constituted one of the best known artificial grounds.

At the time of the accident the only persons in the part of the building where it occurred were one Armstrong, the assistant engineer, one Livesey, the electrician, and the deceased. Livesey was looking after the switchboards. Armstrong had general charge of the engines, Markham, the chief engineer, being away, and Mehan was watching two of the engines, having finished cleaning up No. 7 engine a short time before.

Armstrong testified that just before the accident there was a loud report like thunder and a flash like a flash of lightning at the end of the station where the regulators were, and a reflection on the platework of the switchboard. Mehan started in the direction of No. 7 engine and Armstrong followed him, both running. When they reached No. 7 engine, No. 10 regulator was smoking and a chain cable leading from the regulator to the switchboards above was burning, while a blaze was coming out of one corner of the regulator. Livesey had come down the flight of stairs leading from the switchboard gallery to the engine room floor, and was unscrewing the upper iron bar, separating the regulators from the engine room floor, when Armstrong arrived. Mehan, who had preceded him by sixteen feet, was doing the same; and all three assisted in taking out the upper bar, which enabled Livesey to step over the lower one into the space where the regulators were. As they shifted the bar aside Livesey stepped through with a pail of sand in one hand and a scoop in the other and was scooping up the sand, when Armstrong felt a brushing sensation on one side and turning saw Mehan grasping the iron post with his face drawn close to it

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while his feet stood on the leaden mat around No. 7 engine. He never recovered consciousness. Livesey meanwhile had put out the fire with the sand and dropped the pail to attend to Mehan.

The evidence on the question of the dependence of the plaintiffs upon the wages of their deceased son for support is described in the opinion, as also is the evidence on the question of the defendant's negligence.

At the close of the evidence the defendant among other requests asked the judge to make the following rulings:

"1. On all the evidence in the case the plaintiffs are not entitled to recover.

"2. There was a presumption that the defendant had furnished proper machinery.

"3. There was a presumption that the superintendent of the defendant was a competent person for the business for which he was employed by the defendant."

"7. If it had not been the custom to call upon the oilers to assist when there was trouble in the electrical machinery then the deceased would not be justified in going to the place where he was injured in the expectation that he might be called upon to assist."

"10. Mehan having no duties in connection with the electrical part of the work, the existence of the trouble in regulator No. 10 and the fire was notice to put him on his guard and to keep away."

"16. Upon the evidence in the case the jury would not be warranted in finding that the plaintiffs in the case were dependent for support upon the wages of the deceased at the time of his death."

The judge refused to make any of these rulings, and also refused to make a ruling numbered 15 which afterwards was waived by the defendant. The eleventh ruling requested which the court held to have been given in substance is printed in a footnote on page 61.

The jury returned a verdict for the plaintiffs in the sum of $1,500; and the defendant alleged exceptions.

W. H. Bent, for the defendant.

W. A. Hogan, for the plaintiffs.

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LORING, J. 1. We are of opinion that the seventh and tenth rulings asked for were rightly refused.

The defendant's first contention in support of these rulings is that there was no evidence showing due care on Mehan's part even if he had a right to be where he was, and the case comes within such cases as *Cox* v. *South Shore & Boston Street Railway*, 182 Mass. 497, and *Clare* v. *New York & New England Railroad*, 167 Mass. 39, 40. But it is to be noted that the iron pillar from which Mehan received the fatal shock was but three inches from the engine room floor on which Mehan was standing at the time, and while it is true that the evidence did not warrant a finding that the shock was received before Livesey had passed through the opening made by pushing back the upper bar, it did warrant the finding that it was received within a few seconds after he had done so. The jury were warranted in finding that Mehan and Armstrong helped Livesey in pushing the bar through the socket on the wooden post, that Livesey rushed through the opening so made, with his sand pail, to the regulator in question, some twenty feet from the bar, and was in the act of throwing the sand on this regulator when Mehan received his shock. If the emergency justified and required Mehan to be where he was, the evidence in our opinion warranted a finding that Mehan was in the exercise of due care.

And we are of opinion that the jury were warranted in finding that the emergency did justify and require Mehan to be where he was. The emergency in question was described by Mehan's superior, the engineer, as follows: "a report like thunder, only it was not like thunder, and a flash like a flash of lightning. . . . The third regulator from me was smoking, and a little flame coming out of one corner was on the chain cable leading up to the side; it looked like two tapers; the tape insulation was burning." This happened at 6.45 in the morning, when there were but three persons in the building, the switchboard tender, Livesey, the engineer, Armstrong, and the oiler, Mehan, whose death is the subject of this action. Mehan immediately rushed to the bar, which had to be unscrewed and pushed through the socket before Livesey could get into the electrical enclosure on the floor in question, and Armstrong followed, after seeing to the engine which then was running. The evidence warranted the finding

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that all three took part in getting the bar out of Livesey's way. In our opinion the question whether that emergency justified and required Mehan to give the assistance which he gave was for the jury, although he was employed to oil the engines. See *Somerset & Cambria Railroad* v. *Galbraith*, 109 Penn. St. 32; *Terre Haute & Indianapolis Railroad* v. *Fowler*, 154 Ind. 682; *Pullman Palace Car Co.* v. *Laack*, 143 Ill. 242; *Sears* v. *Central Railroad & Banking Co.* 53 Ga. 630.

This conclusion is fortified by the testimony of Mehan's immediate superior, Armstrong the engineer, that "in case of fire as I understood it his duty was to assist in putting it out if possible," and by the fact testified to by Livesey that there was a fire four or five weeks before the accident here in question, which he (Livesey) assisted in putting out, and "Armstrong and Mehan were there assisting."

The defendant's last contention is that no reason is disclosed why Mehan took hold of the post, if he did, and no invitation for him to do so. The post was but three inches away from the engine floor where the emergency called Mehan, and he might unintentionally have come in contact with it.

2. We are of opinion that the jury were warranted in finding that the defendant was negligent, and that the accident was caused by its negligence. We assume that the defendant was not liable for grounding the iron framework of the switchboard gallery by carrying from it a copper wire to a metal plate buried in the ground, in place of connecting it with the water pipes, because the former method was in common use although not so good a method as the latter. But the jury were warranted in finding that the company knew from the shocks received on the day before the accident by the masons then at work in the basement, that the system in use was not in fact carrying off the electricity which found its way into the framework, and that it was negligent in continuing under these circumstances without giving notice of the danger, and that that negligence caused Mehan's death because the current in the iron post took the line of least resistance through his body and the engine room floor to the water pipes. For these reasons the first ruling was in our opinion rightly refused.

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3. The eleventh ruling * asked for was given in substance. The presiding judge told the jury that: "The law does not say that because an accident happens therefore the employer was liable, that would be reasonable if he was an insurance company, but it is not so. But it assumes an employer to discharge his duty reasonably, with reasonable care, to see the machinery is in proper condition, as would be safe from injury or death; would discharge that duty just as you or I in his place would do." The word "assumes" would seem to be a misprint. However that may be, in answer to a question from the defendant at the close of the charge as to whether he gave this ruling the presiding judge added: "I have said to the jury, without your limitations, as I understand it, that the mere occurrence of an accident would not be evidence of negligence. That is more general than the request, and therefore carries it."

4. The other contention made by the defendant is that the evidence did not warrant a finding that the father and mother of the deceased were dependent on him for support within R. L. c. 106, § 73.

It is settled that partial dependence is enough. *Mulhall* v. *Fallon*, 176 Mass. 266. *Welch* v. *New York, New Haven, & Hartford Railroad*, 176 Mass. 398. *Boyle* v. *Columbian Fire Proofing Co.* 182 Mass. 93. The case relied on by the defendant (*Hodnett* v. *Boston & Albany Railroad*, 156 Mass. 86) was a case where it did not appear that the plaintiff did not support herself by her own wages. See *Mulhall* v. *Fallon*, 176 Mass. 266, 267.

The evidence warranted a finding that at the time of the son's death the family consisted of father, mother, two daughters and one son in addition to the son whose death is the subject of this action. The son whose death is here in question was killed on December 11, 1903. The father and mother had no property and no money in bank. The father was seventy and the wife sixty years old. The father seems to have had no regular

* The ruling requested was as follows: "11. In the present condition of the science of electricity as applied to electric lighting plants in the absence of other evidence of negligence on the part of the defendant the mere occurrence of the accident in this case is no evidence of actionable negligence on the part of the defendant corporation."

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work; he testified that he "worked for Mr. Rose from May until November and received fifteen cents an hour, averaged nine hours a day, averaged five days a week. In the winter I got ten dollars a month for Currier's furnace and three dollars and a half a week for Rose's furnace." The father also testified that his "wife is not an invalid; she is n't very well now"; and she testified that she "had suffered for a long time from neuralgia; sometimes could not perform household duties." Jennie, the younger daughter, had not worked for two years, but had stayed at home and helped her mother in conducting the household; she "did the ordering." Joseph had entered the Tufts Medical School in October, 1902, and since then had lived at home and had his breakfast and supper there while the school was in session, and apparently all his meals during vacation. He worked during the four months' summer holiday. During this time he had received nothing from the family except his lodging and the meals mentioned above, and had contributed nothing to its support. The daughter Mary worked "in the Hamilton," and received from $7 to $8 a week. The son who was killed received $12 a week, which he handed to his mother. The mother testified that since the accident "My family remains the same now with the absence of the one who is killed. We live in the same house, pay the same rent, live as comfortably as we can; we have plenty to eat and drink and wear, and a house to live in." The surviving brother testified that "Mary has had a slight increase in pay since my brother was killed." The father "kept some pocket money, two dollars a week." Subject to this the earnings of the three wage earners, aggregating about $24, were given to the mother for the support of the family of six and the personal expenses of the five, not including Joseph, who was in the medical school and supported himself.

To find for the plaintiff the jury had to find that apart from the board and lodging of Joseph who was in the medical school, the parents were under all the circumstances dependent, in part at least, upon the son who was killed. There was no reason why the expense of Joseph's board and lodging should be charged wholly against the son rather than against the daughter who worked. We do not think that his presence in the family was fatal. Neither do we think the fact fatal that the family

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had since lived in the same house. It appeared that since then the daughter had had a slight increase of pay. But apart from that, having in mind the age and the lack of permanent employment of the father and the facts that for the short time which had elapsed since the death of the son the clothing probably had not had to be renewed but would have to be renewed in the future, and that for the remaining family (except Joseph) all that there was left were the earnings of the father and the one daughter, we are of opinion that the jury were warranted in finding that the parents were dependent, at least in part, on the son who was killed; and that for these reasons the first ruling asked for was rightly refused. We do not find in the bill of exceptions the seventeenth ruling referred to in the defendant's brief.

Exceptions overruled.

ANNIE CAVANAGH *vs.* CARL A. BLOCK.

Suffolk. March 16, 1906. — May 17, 1906.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Nuisance. Way.

A woman passing over a private way on which abuts the house occupied by a person employed by her as a dressmaker, while going to and returning from the house upon this business, has the rights of an abutter on the way as against one maintaining a nuisance thereon.

The owner of a house within his control abutting on a private way which is not a part of his premises, who constructs and maintains the eaves, gutter and conductor of the house in such an improper and negligent manner as to cause in the winter a dangerous accumulation of ice in front of the house upon the part of the way designed and fitted for travel, is liable to a person who while lawfully travelling on the way in the exercise of due care is injured by a fall caused by the nuisance thus created.

TORT for personal injuries from falling on the sidewalk of Humboldt Place, a private way leading out of Dorchester Avenue in Boston, owing to an accumulation of ice and snow caused by the alleged negligence of the defendant in maintaining the adjoining premises owned and controlled by him. Writ dated February 26, 1903.

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At the trial in the Superior Court *White*, J. at the close of the plaintiff's evidence ordered a verdict for the defendant; and the plaintiff alleged exceptions. The facts which a jury would have been warranted in finding on the evidence are stated in the opinion.

J. A. McGeough, (*W. J. Sullivan* with him,) for the plaintiff.

J. E. Young, for the defendant.

KNOWLTON, C. J. The plaintiff was injured by falling upon an accumulation of ice on a walk at the side of a private way called Humboldt Place. A block of eight tenement houses was built on one side of this way, close to the line of the sidewalk, along the front of the lots. The defendant's house was No. 6, and, like the others, it occupied the entire front of the lot, which was twenty-one feet wide. It was a three story wooden building, with a tar and gravel roof pitching slightly to the front and rear from the ridgepole in the centre. The eaves in front extended over the sidewalk about twenty-two inches from the wall of the house. A gutter was constructed under the eaves in front, with a conductor, which extended down from near the end of the gutter, on the side of the house, and emptied water on the sidewalk. The abutters constructed sidewalks in front of their respective premises, some of brick and others of plank. That in front of the defendant's house was of plank. All the abutters had a right in common to use the way, and the sidewalk was used by all abutters and others who had occasion to pass over the way.

The occupant of one of these houses was employed to do dressmaking for the plaintiff, and the plaintiff went to the house on this business. She was there by invitation, and was not a mere licensee, if that would make any difference in a case of this peculiar kind, which we do not decide. In passing along the way she stood in the place of an abutter, and in using the walk she was in the exercise of a legal right.

There was evidence for the jury on the question whether she was in the exercise of due care. *Shipley* v. *Proctor*, 177 Mass. 498. *Smith* v. *Lowell*, 6 Allen, 39. *Frost* v. *Waltham*, 12 Allen, 85. *McGuinness* v. *Worcester*, 160 Mass. 272.

She was not upon the defendant's premises, and there is no evidence that he was under any legal obligation to keep the

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way in front of his house safe and convenient for the occupants of other houses, or for those using the way in their right, but it was his duty not to use his own property in such a manner as to create a nuisance on the way. *Watkins* v. *Goodall*, 138 Mass. 533. It was his duty not to erect his house so near the way, or to construct gutters or conductors to discharge the water that accumulated on his roof upon the way, in such a manner as to make a dangerous accumulation of ice in winter, which would make the way unsafe for travel.

There was evidence from which the jury might have found that the construction of the house and the gutter and conductor was improper and negligent, in reference to the defendant's duty not to create a nuisance upon property which belonged to others, for use in connection with their respective estates. The evidence tended to show that this conductor might be expected to accumulate, and did accumulate, in cold weather, a great irregular mass of ice in that part of the way which was designed and fitted for travel. That there is a liability on the part of the owner, to one injured from such a cause, has been decided in many cases. *Kirby* v. *Boylston Market Assoc.* 14 Gray, 249. *Milford* v. *Holbrook*, 9 Allen, 17. *Shipley* v. *Fifty Associates*, 101 Mass. 251. *Watkins* v. *Goodall*, 138 Mass. 533. *Smethurst* v. *Barton Square Church*, 148 Mass. 261. The liability does not depend upon an obligation to keep the way in good condition, but upon the duty of every landowner not to accumulate water on his premises and discharge it from a spout or channel upon neighboring property to the injury of those rightfully using that property. The principle is very similar to that which is the ground of the decision in *Corrigan* v. *Union Sugar Refinery*, 98 Mass. 577. Cases like *Moffatt* v. *Kenny*, 174 Mass. 311, where the injury happened to the plaintiff while on the defendant's property, have no application to this action.

The defendant testified that, if there was any occasion to repair the roof or look after the conductor or gutter, his agent would employ a man to do it, and the defendant would pay the bill. He also said that he made all repairs, and once every year before the cold weather he employed a man to clean out the gutters. The jury well might find that the defendant, and not

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the tenant, was responsible for the construction and condition of the roof, gutter and conductor. The defendant was not relieved from his duty to keep the premises in such a condition as not to create a nuisance by a covenant of the tenant, as in *Wixon* v. *Bruce*, 187 Mass. 232.

We are of opinion that the case should have been submitted to the jury.

Exceptions sustained.

INHABITANTS OF WALPOLE *vs.* MASSACHUSETTS CHEMICAL COMPANY.

Norfolk. March 16, 1906. — May 17, 1906.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Easement. Water Rights. Waterworks. Municipal Corporations. Walpole. Mills and Mill Privileges.

Under St. 1893, c. 277, authorizing the town of Walpole, for the purpose of supplying itself and its inhabitants with water, to take and hold certain waters and the water rights and water sources connected therewith, and also all lands and easements necessary for holding and preserving such water, a taking of an entire parcel of land for the purposes named in the statute, describing it by metes and bounds and as if it were unincumbered, includes the taking from a riparian owner on a stream below of an easement to flow the land in connection with a dam on that stream, and it is immaterial that no personal notice of the taking was given to the owner of the easement if notice was given by recording the taking in the registry of deeds in accordance with the terms of the statute.

Whether a town by a taking of land for the purpose of supplying its inhabitants with water, under a statute authorizing it to take and hold certain waters and the water rights connected therewith and all lands and easements necessary for holding and preserving such water, would deprive a riparian proprietor on the stream below of his right to build a dam under the mill act and set back water on the land above by paying damages to the owner, was not decided in this case because the question was not raised.

BILL IN EQUITY, filed October 17, 1900, to restrain the defendant from flowing two parcels of land taken by the plaintiff under St. 1893, c. 277, by a taking recorded in the registry of deeds in accordance with the provisions of that statute, on which the plaintiff had driven wells and established a pumping station with its necessary equipment used in supplying itself and its inhabitants with water.

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In the Superior Court the case came on to be heard before *Schofield*, J. upon the report of a special master and exceptions thereto. At the request of the counsel on both sides the judge without making any ruling or decision reserved the case and all questions of law therein under R. L. c. 159, § 29, for determination by this court, and reported it for such determination upon the pleadings, the report of the special master and the exceptions thereto, such decree to be entered and such orders to be made as justice and equity might require.

The first three sections of St. 1893, c. 277, are as follows:

"Section 1. The town of Walpole may supply itself and its inhabitants with water for the extinguishment of fires and for domestic and other purposes; may establish fountains and hydrants, relocate or discontinue the same, and may regulate the use of such water and fix and collect rates to be paid for the use of the same.

"Section 2. The said town, for the purposes aforesaid, may take, by purchase or otherwise, and hold waters from the valley of the Neponset River and its tributaries, from Spring Brook, so-called, Mill Brook, so-called, and Traphole Brook, or the waters of any other brook, or any springs, artesian or driven wells or filter galleries, within the limits of said town of Walpole, and the water rights and water sources connected therewith; and also all lands, rights of way and easements necessary for holding and preserving such water and for conveying the same to any part of said town of Walpole; and may erect on the land thus taken or held proper dams, buildings, fixtures and other structures, and may make excavations, procure and operate machinery, and provide such other means and appliances as may be necessary for the establishment and maintenance of complete and effective water works; and may construct and lay down conduits, pipes and other works, under or over any lands, water courses, railroads or public or private ways, and along any such way in such manner as not unnecessarily to obstruct the same; and for the purpose of constructing, maintaining and repairing such conduits, pipes and other works, and for all proper purposes of this act, said town may dig up any such lands, and, under the direction of the board of selectmen of the town in which any such ways are situated, may enter upon and dig up any such

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ways in such manner as to cause the least hindrance to public travel thereon.

"Section 3. Said town shall, within sixty days after the taking of any lands, rights of way, water rights, water sources or easements as aforesaid, otherwise than by purchase, file and cause to be recorded in the registry of deeds for the county and district in which the same are situated, a description thereof sufficiently accurate for identification, with a statement of the purpose for which the same were taken, signed by the water commissioners hereinafter provided for."

C. K. Cobb, for the plaintiff.

J. E. Cotter & C. F. Jenney, for the defendant.

KNOWLTON, C. J. This is a bill in equity to restrain the defendant from flowing the land occupied by the plaintiff as a part of its system for supplying water to its inhabitants. This land was taken by the town under St. 1893, c. 277, and the defence relied upon is that the defendant has an easement in the land, namely, a right to flow the land in connection with a dam on the stream below, which right has been owned by it and its predecessors in title since 1659, when it was granted by the town of Dedham. The plaintiff denies that the defendant or its predecessors in title have owned such a right in recent years, and contends that, if they owned it, it was included in the plaintiff's taking under the statute, and was thereby extinguished.

The master in his report says that the defendant rests its right upon three grounds: first, an ancient grant from the town of Dedham in 1659; second, a so called covenant or agreement made in 1724 between the then owners of the mill privilege and the owners of the meadows above it; and third, a right by prescription or adverse use. The case was heard at length, and many questions of law and of fact arose before the master. Numerous exceptions to the master's report were taken by both parties. The master found that the defendant has a right of flowage over the land in the winter season, and, at the hearing before the judge, the case was reserved for the full court upon the pleadings, the master's report and the exceptions thereto.

The master ruled that the plaintiff's taking did not include the easement claimed by the defendant, and the plaintiff's first

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exception is to this ruling. It is conceded by the defendant that the statute is broad enough to enable the town to take such a right, and the ruling seems to have been made on the ground that the defendant's easement was a water right, and that the language of the instrument of taking does not include such a right. The instrument does not purport to take any right to the water of the stream. After appropriate recitals, it purports to take two lots of land, which are particularly described by metes and bounds, and it declares that "the taking of the land embraced in this description is for the use of constructing, laying down, maintaining and repairing conduits, pipes and drains for the taking, holding and conveying of water in, under and over the same towards and into different parts of said town of Walpole for distribution and use therein, and for the use and purposes of a site for buildings and structures which may be erected thereon, and for the sinking of filter wells and driven wells and for the holding and preserving of such water, and for the use and purpose of passing to and from said buildings or structures, and of laying down, maintaining and repairing conduits, pipes and drains to and from the same, as all the same may be necessary or convenient in constructing, maintaining and operating a system of water works for said town of Walpole under the provisions of said act."

This is a taking of the entire title to the land, so far as necessary for the purposes set forth, and is within the authority of the statute. If the ownership of the land had been divided, so that certain interests were owned by one party and other interests by another party, it would have included them all, at least so far as they were needed for the uses to which the land was to be put, just as it would if they had all been owned by one person. The easement now claimed by the defendant was one that could not be left outstanding, consistently with the proper exercise of the plaintiff's rights in the land. This easement, if it continued valid, would enable the defendant to flow the land on which the plaintiff's pumping station is erected, and thereby to interfere with the use of the building and the system of pumps and driven wells by which the plaintiff obtains water. It is as if the easement were a right of way over the land where the pumping station is erected. Such a right, annexed to a neighboring

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estate, would be taken by a taking of the whole of the servient tenement for such a public use. An easement is an interest in the land, carved out of it for the benefit of the owner of the dominant tenement, and it leaves the owner of the servient tenement with a title limited by the ownership of this separate interest in another person. So a taking of the entire land, which describes it as if it were unincumbered, includes the easement, just as it would include a leasehold estate, as well as the fee or reversion. *Commonwealth* v. *Fisher*, 6 Met. 433. *Sprague* v. *Dorr*, 185 Mass. 10, 13. It is immaterial that no personal notice of the taking was given to the owner of the easement. The notice by the public acts of the town and its officers and the registration required by the statute are enough to vest a good title in the town. *Appleton* v. *Newton*, 178 Mass. 276. *Sweet* v. *Boston*, 186 Mass. 79.

The case is entirely different from one in which the right claimed to be taken is outside of the land in the waters of the stream as it flows to riparian proprietors below. The ruling that the defendant's right of flowage, existing as an easement in the land before the taking, remained unaffected by the taking was erroneous.

This view of the case makes it unnecessary to consider the many questions raised by the other exceptions, which relate to the defendant's title to the easement.

It is also unnecessary to consider whether a taking of land under this statute would deprive a riparian proprietor on the stream below of his right to build a dam under the mill act, and set back the water upon the land above, by paying damages to the owner. No such question was raised at the hearing.

Decree for the plaintiff.

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JAMES E. MARTYN *vs.* GEORGE O. HITCHINGS.

Suffolk. March 20, 1906. — May 17, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, BRALEY, & SHELDON, JJ.

Contract, Construction. *Option*. *Words*, "Option."

In a suit in equity to enforce specifically an alleged agreement to purchase certain bonds from the plaintiff the following facts appeared by the bill, to which the defendant demurred: The plaintiff on January 1 of a certain year delivered to the defendant an agreement of option and the defendant acknowledged in writing at the foot of the agreement its delivery to him on that day. By this instrument the plaintiff agreed to sell the defendant on or before February 10 of that year $700,000 of the bonds in question on being paid a price named, and agreed "in case this option is accepted" to endeavor to procure $50,000 more of the same bonds for delivery at the same price. The agreement recited that in addition to the $750,000 of the bonds mentioned above there were $59,000 of the bonds pledged for the debts of the corporation that issued them, and the plaintiff agreed "in case this option is accepted" to sell to the defendant these bonds also at the same price. There also were other outstanding bonds which the plaintiff agreed to help the defendant to procure "in case this option is accepted" and the plaintiff also agreed "in case this option is taken up" to sell to the defendant certain shares of the corporation which issued the bonds at certain prices named. After these provisions came the following: "It is also hereby expressly understood that" the defendant "is to purchase upon accepting this option $20,000 of said bonds out of said above mentioned lot of $59,000" at the price named, the "proceeds of said sale to be applied to the payment of certain debts of" the corporation. There was another agreement made between the plaintiff and the defendant of the same date as the agreement of option relating to the coupons of the bonds named in that agreement which among other things made a provision for the coupons of the lot of $59,000 of the bonds which was conditional on the exercise of the option by the defendant. Shortly after January 1 and before February 10 the defendant paid to the plaintiff at his request $100 to be applied toward one of the debts of the corporation in question. The defendant allowed the time to expire without exercising his option and refused to buy any of the bonds. The plaintiff contended that the defendant had agreed in any case to buy $20,000 of the bonds upon accepting the instrument of option. *Held*, that the words "upon accepting this option" in the clause relating to the $20,000 of bonds meant the exercise by the defendant of the option to purchase $700,000 of the bonds and not the acceptance of the agreement of option, having the same meaning as the corresponding words in the other parts of the agreement, that the payment of $100 by the defendant at the plaintiff's request as a part of the purchase money for the bonds was not an exercise of the option and did not bind the defendant to purchase the bonds, that the conduct of the parties in doing nothing about the $20,000 of bonds when the agreement of option was delivered tended to support the construction of the contract adopted by the court, and that the bill should be dismissed.

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BILL IN EQUITY, filed March 12, 1903, and amended June 6, 1904, and June 26, 1905, to enforce specifically an agreement in writing annexed to the bill as Exhibits A. and B. and printed below by compelling the defendant to purchase from the plaintiff $20,000 of the bonds of the Rio Grande Irrigation and Colonization Company.

The defendant demurred to the bill before its amendment alleging as causes of demurrer want of equity and that there was no memorandum in writing of the contract signed by the party to be charged as required by R. L. c. 74, § 5. The case was heard by *Fessenden*, J., who sustained the demurrer. The plaintiff appealed, and afterwards was allowed to amend his bill by adding the following paragraph:

"That afterwards, shortly after January 1, 1903, and before February 10, 1903, the defendant acknowledged his obligation under said agreements or options by paying to the said Martyn or at his request the sum of $100 to be applied towards one of the certain debts of the said Rio Grande Company mentioned in said agreements or options; that the plaintiff has ever been ready and willing to sell, transfer and deliver said bonds mentioned in said seventh paragraph to the defendant upon his paying the balance of the purchase price thereof, and has been ready to apply the proceeds to the payment of said certain debts of the Rio Grande Irrigation and Colonization Company but the defendant, though often requested so to do and though a reasonable time thereafter has already elapsed, has not completed said purchase by taking said bonds and paying for the same, and still refuses to take said bonds and pay the balance of the purchase price thereof as agreed."

The defendant demurred to the bill as amended alleging the same causes.

The case was heard by *Richardson*, J., who sustained the demurrer. Thereafter the plaintiff was allowed further to amend his bill by adding after the "$100" in the paragraph above quoted the words "as a part of said purchase price of the $20,000 of bonds mentioned in clause seventh of Exhibit A. said $100."

It was agreed by the parties that the defendant's last demurrer should apply to the bill as finally amended. *Richardson*, J. made

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an order overruling the demurrer to the bill as finally amended, and the defendant appealed.

The judge, being of the opinion that the questions raised by the demurrer so affected the merits of the controversy that the matter ought, before further proceedings, to be determined by this court, at the request of the parties reported the case for such determination. If the demurrer to the bill as finally amended was rightly overruled the defendant was either to plead or answer; otherwise, the bill was to be dismissed.

Exhibits A. and B. containing the alleged contract sought to be enforced were as follows:

"Exhibit A.

"I, James E. Martyn of Boston in the County of Suffolk and Commonwealth of Massachusetts, as I am the holder as Trustee of certain First Mortgage Five Per Cent Gold Bonds of the Rio Grande Irrigation and Colonization Company, and am the holder as Trustee of certain stock of said Company, in consideration of one dollar and other good and valuable considerations to me paid by George O. Hitchings of said Boston, the receipt whereof is hereby acknowledged, do hereby give, grant and assign to said George O. Hitchings, the following option namely, —

"First. The right to purchase from me as such trustee said bonds to the amount of seven hundred thousand dollars ($700,000) face value, the price to be paid therefor to be seventy (70) per cent of their face value with accrued interest from January first, 1903. I also hereby agree that in case this option is accepted by said Hitchings, as hereinafter provided, I will use my utmost endeavors to procure the sale and delivery to him of fifty thousand dollars ($50,000) of said bonds or such part thereof as I can obtain control of, the price to be paid therefor to be seventy (70) per cent of the face value thereof with accrued interest from January first, 1903. Payment for said lots of seven hundred thousand dollars ($700,000) bonds and fifty thousand dollars ($50,000) bonds to be made in three (3) instalments, one-third of said purchase price to be paid in twelve months from January first 1903, one-third in eighteen months from said date, and the last third in twenty-four months from said date.

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"Second. And for the consideration aforesaid I hereby agree that in case this option is taken up as hereinafter provided, that I will sell to said George O. Hitchings all or any part of twenty-eight thousand five hundred (28,500) shares of the capital stock of said Rio Grande Company for the price of ten dollars ($10) per share, payment for such shares to be made thirty (30) months after January first 1903, and I will also sell to said George O. Hitchings in addition to said twenty-eight thousand five hundred (28,500) shares, forty-five hundred (4500) shares of said stock at two dollars ($2) per share, also payable thirty (30) months after January first 1903.

"Third. And whereas, in addition to said seven hundred and fifty thousand dollars ($750,000) bonds, there are certain other bonds of said Rio Grande Company, of the total face value of fifty-nine thousand dollars ($59,000), which bonds are pledged as security for certain debts of said Rio Grande Company, which said debts do not exceed fifty thousand dollars ($50,000).

"Now, for the consideration aforesaid, I hereby covenant and agree that in case this option is accepted by said Hitchings, as hereinafter provided, I will sell to him fifty-nine thousand dollars ($59,000) bonds, the price to be paid therefor to be seventy (70) per cent of the face value and accrued interest thereof.

"Fourth. And whereas, in addition to said above mentioned lots of bonds, there are one hundred and eighty-seven thousand dollars ($187,000) of said bonds outstanding held by various parties.

"Now, for the consideration aforesaid, I hereby covenant and agree that in case this option is accepted by said Hitchings I will use all reasonable efforts to help him get in said one hundred and eighty-seven thousand dollars ($187,000) bonds, said Hitchings to have the right to sell such part of said one hundred and eighty-seven thousand dollars ($187,000) bonds together with any coupons due and unpaid thereon, to reimburse himself for the expenses by him or on his behalf incurred in getting in said one hundred and eighty-seven thousand dollars ($187,000) bonds. It being provided that upon reimbursement for such expenses said Hitchings shall deposit the balance (as said Hitchings gets in such balance) of said one hundred and eighty-seven thousand dollars ($187,000) in escrow with the American Loan and Trust

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Company upon the condition that said American Loan and Trust Company shall not allow the same to be sold until all the bonds taken by said Hitchings under this option shall have been paid for.

"Fifth. And for the consideration aforesaid I hereby give to said Hitchings the right to purchase treasury bonds of said company to the amount of three hundred thousand dollars ($300,000) the price to be paid therefor to be seventy (70) per cent of their face value and accrued interest, and I hereby agree to give said George O. Hitchings three thousand shares of the treasury stock of said Rio Grande Company as a bonus with said bonds, provided that if said Hitchings shall take only a portion of said three hundred thousand dollars ($300,000) bonds upon the above terms, that the number of shares so to be given to him as a bonus shall bear the same proportion to said three thousand (3000) shares as the number of said bonds so taken shall bear to the whole three hundred thousand dollars ($300,000) of said bonds.

"Sixth. And for the consideration aforesaid I hereby give said Hitchings the right to buy the balance of the treasury bonds of said Rio Grande Company at the rate of ninety (90) per cent of the face value and accrued interest thereof.

"Seventh. It is also hereby expressly understood that said Hitchings is to purchase upon accepting this option twenty thousand dollars ($20,000) of said bonds out of said above mentioned lot of fifty-nine thousand dollars ($59,000) the purchase price to be seventy (70) per cent of the face value thereof, proceeds of said sale to be applied to the payment of certain debts of said Rio Grande Company.

"Eighth. It is understood hereunder that said Hitchings is to use his best endeavors to anticipate all payments for bonds and stock under this option.

"Ninth. This option is to remain open through February tenth 1903.

"In witness whereof I hereunto set my hand and seal this first day of January 1903.

"Jas. E. Martyn. (Seal.)

"The foregoing option is a true copy of one delivered to me today.

"George O. Hitchings."

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"Exhibit B.

"Whereas I, James E. Martyn of Boston in the County of Suffolk and Commonwealth of Massachusetts, have this day given a certain option upon certain stock and bonds of the Rio Grande Irrigation and Colonization Company to George O. Hitchings of said Boston; and

"Whereas there are annexed to the lots of seven hundred thousand dollars ($700,000) bonds and fifty thousand dollars ($50,000) bonds, mentioned in said option, coupons due and unpaid for three years last past; and

"Whereas upon the lots of fifty-nine thousand dollars ($59,000) bonds there are coupons due and unpaid for several years, —

"Now therefore in consideration of one dollar and other good and valuable considerations paid by said George O. Hitchings, the receipt whereof is hereby acknowledged, I hereby give, grant and assign to said George O. Hitchings, the following option namely: —

"Upon the purchase by said Hitchings of any or all of the above mentioned bonds I hereby agree to fund the coupons of any or all bonds so purchased at the face value of said coupons by turning over therefor to said Hitchings treasury bonds of said Rio Grande Company, upon the following terms: Any bonds so turned over for coupons annexed to bonds of the seven hundred thousand dollars ($700,000) and fifty thousand dollars ($50,000) above mentioned to be sold for seventy (70) per cent of their face value, payment to be made, one third in twelve months from January first 1903, one third in eighteen months from said date and the last third in twenty four months from said date; any bond turned over for coupons annexed to said lot of fifty-nine thousand dollars ($59,000) to be sold at seventy (70) per cent of their face value.

"This option is to remain open through February tenth 1903.

"In witness whereof I hereunto set my hand and seal this first day of January 1903.

"Jas. E. Martyn. (Seal)

"The foregoing option is a true copy of one delivered to me today.

"George O. Hitchings."

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H. N. Berry, (*H. LeB. Sampson* with him,) for the defendant.

H. R. Bailey, for the plaintiff.

KNOWLTON, C. J. The rights of the parties in this case depend upon the meaning of the contract contained in the two papers signed by the plaintiff and delivered to the defendant, bearing date January 1, 1903. The second of these papers relates to coupons annexed to bonds referred to in the first paper, and it was to have effect only upon condition that the defendant exercised the option to buy bonds given him in the first paper. It is therefore of but little consequence as an aid in the construction of the first contract.

The contract contained in the first paper is the giving of an option by the plaintiff to the defendant, to remain open through February 10, 1903, which option was "the right to purchase", from the plaintiff as trustee, certain bonds to the amount of $700,000, face value, at the price of seventy per cent of their par value, with accrued interest after the date of the contract. In the first clause of the contract the plaintiff also agrees "that in case this option is accepted by said Hitchings, as hereinafter provided," he will endeavor to procure the sale and delivery of $50,000 more of the same kind of bonds, or such part thereof as he can obtain control of, at the same price. In the second clause, "in case this option is taken up as hereinafter provided," he makes an agreement to sell at a certain price stock of the company that issued the bonds. In the third clause there is an agreement of the plaintiff to sell certain other bonds of the same kind, at the same price, "in case this option is accepted by said Hitchings, as hereinafter provided." Plainly, the option referred to in each of these clauses is the right to buy the bonds to the amount of $700,000, face value, referred to in the first clause, and "accepted . . . as hereinafter provided" means accepted within the time that the option is to remain open under the ninth clause, which is through February 10.

The fourth clause contains an agreement of the plaintiff to use all reasonable effort to help the defendant get $187,000 more of the same bonds then outstanding in the hands of various parties, and this agreement is only "in case this option is accepted by said Hitchings." The option referred to here is the same.

The fifth and sixth clauses give the defendant the right to

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buy certain treasury bonds of the same kind, with certain treasury stock, at prices stated.

The seventh clause, upon which the plaintiff founds his suit, is as follows: "It is also expressly understood that said Hitchings is to purchase upon accepting this option $20,000 of said bonds out of said above mentioned lot of $59,000 the purchase price to be seventy per cent of the face value thereof, proceeds of said sale to be applied to the payment of certain debts of said Rio Grande Company." The lot of $59,000 is the one referred to in the third clause of the contract.

The contention of the plaintiff is that the words "upon accepting this option", in the seventh clause, mean upon the delivery and acceptance of the writing, which purports to give an option to be exercised on or before February 10. He contends that the obligation of the defendant to purchase bonds to the amount of $20,000 became absolute immediately on the delivery and acceptance of the paper. He thus gives the words "this option", in this clause, a meaning different from their obvious meaning in every other part of the contract. The bill as originally drawn was plainly founded on this construction of the contract, and the two amendments do not change it in this particular.

The defendant, on the other hand, contends that accepting this option, in the seventh clause, means the same thing as the similar language in the first, second, third and fourth clauses of the contract, namely, the election to purchase $700,000 of bonds, upon which everything else is made to depend. The third clause, in which the words are plainly used in that sense, refers to the sale of the same lot of bonds which are to be purchased under the seventh clause if the option is accepted. In the ninth clause the word "option" has the same meaning. Looking for a moment at the second writing, the plaintiff's agreement in reference to the coupons upon this lot of $59,000 is made conditional upon the purchase of the bonds by the defendant. This is inconsistent with the existence of a contract of purchase which was absolute the moment that the writing was delivered and accepted.

While the case is not free from difficulty, we are of opinion that the construction contended for by the plaintiff is not correct. It seems a strained and unnatural view to hold that the words "this option", in the seventh clause, mean a paper writing,

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while in every other part of the instrument they mean the right to purchase certain specified property within a stated time at a stated price.

The averments in the amendments to the bill have little bearing upon this point. They are intended to relieve from the defence of the statute of frauds, and to show how the parties interpreted the contract. In the view that we take of the case the statute of frauds becomes immaterial. A payment of $100 by the defendant to the plaintiff, or at his request, as a part of the purchase price of the bonds referred to in the seventh clause, made at some time after January 1, 1903, and before February 10, 1903, does not bind the defendant to purchase these bonds, if he elected not to accept the option. This is conceded by the plaintiff upon the interpretation which we give to the word "option." The plaintiff relies upon the averment as showing the defendant's construction of the contract; but if the contract means what the plaintiff contends that it means, the defendant should have taken and paid for bonds to the amount of $20,000 on the delivery of the paper. The conduct of the parties, taken as a whole, tends to support the defendant's rather than the plaintiff's construction of the contract.

Bill dismissed.

HELEN R. ROBINSON *vs.* CHARLES F. COGSWELL & another.

CHARLES F. COGSWELL *vs.* NEWBERT J. HALL & others.

GEORGE D. BURRAGE, administrator, *vs.* CHARLES F. COGSWELL & another.

Norfolk. March 20, 21, 1906. — May 17, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, BRALEY, & SHELDON, JJ.

Devise and Legacy. Executor and Administrator. Probate Court. Equity Jurisdiction, Bill for instructions, To enforce trust. *Trust.*

A bequest to a sister of the testatrix of "all moneys or estate that may be recovered" in a certain action named is a specific legacy, and under R. L. c. 135, §§ 26, 27, the proceeds of the judgment obtained by the executor in the action are to be paid in full to the legatee without being diminished by contribution for

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the payment of debts if there is property devised generally sufficient for the payment of the debts.

Where it is necessary for an executor or administrator to sell real estate to pay debts and charges of administration a mortgage on a part of the real estate securing a note barred by the special statute of limitations is not a debt of the estate to be paid by the executor or administrator, but is an incumbrance upon the real estate subject to which the property will be sold if the executor or administrator sells the mortgaged portion of the real estate.

On a bill in equity by an executor for instructions as to which of the parcels of real estate of the testator he shall sell first to pay debts and charges of administration and which parcel he shall sell next if another sale becomes necessary, all the parties interested joining in the prayer for instructions, it was *held*, that, although under R. L. c. 146, §§ 6–8, the power to authorize such a sale is in the Probate Court and this court cannot direct or control the action of the Probate Court in the matter, this court will instruct the executor how he should make his application to the Probate Court, leaving that court to deal with it when made.

Where a testatrix devises all of her real estate to her son and her brother "their heirs and assigns in fee simple" and then makes numerous provisions as to the management and disposition of the real estate and as to payments to be made from the proceeds of it, although neither the word "trust" nor the word "trustee" is used, a trust is created, and the devisees hold the legal title to the property in trust to manage and finally dispose of it according to the directions in the will.

A testatrix devised all her real estate to her son and her brother in trust, and provided that two adjoining dwelling houses built by her should not be sold until the expiration of five years after her death, that one of the two houses with the furniture therein should "be used, occupied and enjoyed as and for a home" for her son, her brother, a sister and a son of the sister, and "that, whenever said dwelling shall be sold, that out of the proceeds of such sale" her son should be paid out of her estate the sum of $6,000, and directed "that the balance of the money or estate remaining from the sale of said dwelling houses" should be invested in suitable and profitable real estate in Brookline or Boston. She directed that her son should pay to her brother during his natural life one third of the net income of certain other real estate owned by her. The administrator *de bonis non* of the estate with the will annexed brought a bill for instructions, all the parties interested joining in the prayer, as to which of the parcels of real estate the plaintiff should sell first to pay debts and charges of administration and which parcel he should sell next if another sale became necessary. It appeared that more than five years had elapsed since the death of the testatrix, and that controversies existed among the beneficiaries so that it was impossible for them to occupy together the designated one of the two adjoining houses in the manner contemplated by the testatrix. *Held*, that in applying to the Probate Court under R. L. c. 146, §§ 6–8, for a license to sell real estate the plaintiff should ask for leave to sell the one of the two adjoining houses which was intended for occupation for five years by the beneficiaries, and also for leave to sell the adjoining house if the proceeds from the sale of the first house would not be sufficient, after paying $6,000 to the son of the testatrix, to pay the debts and charges of administration of the estate. The court, being unable to determine from the facts appearing of record whether the interests of the beneficiaries better would be promoted by selling both of the adjoining houses at the same time, or by selling first the one indicated if the sale of that one was likely to be

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sufficient, instructed the plaintiff that he might make his application in either form as seemed to him best.

A testatrix devised all her real estate to her son and her brother in trust, and directed them to "see to it" that her sister named "be suitably and comfortably maintained during her natural life." *Held*, that the sister of the testatrix was entitled to enforce this trust by a suit in equity against the son and brother of the testatrix, and that if the defendants failed to provide such maintenance the plaintiff could have the trust administered by others in their stead.

THREE BILLS IN EQUITY, filed in the Supreme Judicial Court respectively on July 10, July 27 and August 8, 1905, the first by Helen R. Robinson against Charles F. Cogswell and Newbert J. Hall to compel them to provide a suitable and comfortable maintenance for the plaintiff as required by the will of Hannah Etta Cogswell, late of Brookline; the second by Charles F. Cogswell against Newbert J. Hall and others, praying that the plaintiff and the defendant Hall might be ordered to sell the real estate numbered 9 and 11 on Centre Street in Brookline, as directed by the will of Hannah Etta Cogswell and from the proceeds pay the plaintiff at once $6,000 and damages for its detention; and the third by George D. Burrage, as administrator *de bonis non* with the will annexed of the estate of Hannah Etta Cogswell, for a marshalling of the assets of the estate, and for instructions.

The will of Hannah Etta Cogswell was dated January 11, 1900. The testatrix died on March 5, 1900, and the will was admitted to probate on July 25, 1900.

The material portion of the will was as follows:

"I give and bequeath unto my sister, Helen R. Robinson, all my clothing and wearing apparel, and also all moneys or estate that may be recovered in the action of law of myself against one Francis Fisher Robinson and one Charles C. Morgan, named as trustee in said action entered in the Superior Court, Civil Business, for Suffolk County, in the present January entries. Item. I give and bequeath unto the said Dr. Charles F. Cogswell and the said Dr. Newbert J. Hall, their heirs and assigns in fee simple, all my real estate, wherever or however the same may be situated; but I limit and restrict the sale and conveyance and transfer of the dwelling houses numbered nine (9) and eleven (11) Centre street, in said Brookline, until the elapsing of five years after my decease; also that all the furni-

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ture in dwelling No. 9 shall go with the said dwelling in the bequest; also that the dwelling numbered nine (9), together with the furniture therein shall be used, occupied and enjoyed as and for a home for said Dr. Charles F. Cogswell, Dr. Newbert J. Hall, Helen R. Robinson and her son, John Brooks Robinson, so long as said Dr. Cogswell and Dr. Hall shall own the same; also that whenever said dwelling shall be sold, that out of the proceeds of such sale the said Dr. Charles F. Cogswell shall be paid and receive from my estate or my said executors the sum of six thousand dollars, without limit, qualifications or restriction, as his sole and separate property, and direct and will that the balance of the money or estate remaining from the sale of said dwelling houses shall be invested in suitable and profitable real estate in said Brookline or in the City of Boston, in our County of Suffolk, and that such part or portion of the said real estate as may be fit and proper is to be had, used, occupied and enjoyed as and for a home, as and for said Dr. Cogswell, Dr. Hall, Helen R. Robinson and John Brooks Robinson. I also direct and will that the said Dr. Cogswell shall pay unto the said Dr. Hall during his natural life one-third of the net income of the premises now numbered 1356 on Beacon street, in said Brookline, and at this date occupied by one J. A. Purrington; and I also direct and request that the said Dr. Hall and the said Dr. Cogswell see to it that the said Helen R. Robinson be suitably and comfortably maintained during her natural life. And I also direct and will that upon the decease of either said Dr. Cogswell or Dr. Hall the whole of the remaining estate, either real, personal or mixed, then shall descend to the survivor of them, discharged of all limitation, conditions, restrictions, and free in full fee simple to the said survivor. Item. I hereby nominate and appoint the said Dr. Charles F. Cogswell and the said Dr. Newbert J. Hall to be the executors of this, my last will and testament, and request that no sureties be required upon their official bonds for the performance and discharge of their duties herein required, and also that no appraisal of my estate shall be made or be required, and that my said executors be exempt from returning any inventory or appraisal of my estate, or any part or portion thereof."

Helen R. Robinson was a sister of the testatrix, Newbert J.

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Hall was a brother of the testatrix, and Charles F. Cogswell was the son and the only child of the testatrix. The other material facts are stated in the opinion.

The cases came on to be heard before *Braley*, J., who made an order that the three cases be consolidated, and reserved them upon the pleadings and the agreed facts for determination by the full court.

G. D. Burrage, for the administrator with the will annexed, *pro se*.

H. E. Perkins, (*W. M. Robinson* with him,) for Helen R. Robinson.

E. C. Bumpus, (*J. B. Sullivan, Jr.* & *F. E. H. Gary* with him,) for Charles F. Cogswell.

H. P. Harriman, for Newbert J. Hall.

KNOWLTON, C. J. These three suits in equity were consolidated and heard together before a single justice, and reserved for the consideration of the full court. The last of them, which we will consider first, is a bill by an administrator *de bonis non* with the will annexed of Hannah E. Cogswell, late of Brookline, deceased, asking for instructions in the settlement of her estate. It is necessary to sell real estate to pay debts and charges of administration, and the first question is whether the legacy to Helen R. Robinson, the sister of the testatrix, of "all moneys or estate that may be recovered in the action of law . . . against one Francis Fisher Robinson and one Charles C. Morgan, named as trustee in said action," which moneys amount to $984.60, collected by the plaintiff as the proceeds of the judgment obtained in the action, is to be paid in full to the legatee or to be diminished by way of contribution for the payment of debts.

We are of opinion that this was intended by the testatrix to be a specific legacy, and therefore not subject to be diminished by way of contribution so long as there is property devised generally sufficient for the payment of the debts. R. L. c. 135, §§ 26, 27. *Blaney* v. *Blaney*, 1 Cush. 107, 115. This sum, with any interest that has accrued thereon, should be paid to Helen R. Robinson.

Another question is whether the mortgage of $5,000, which is an incumbrance outstanding upon a part of the real estate, is a debt of the estate to be paid by the plaintiff. Upon the facts stated, this debt appears to be barred by the special statute of

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limitations. It is therefore not a debt to be paid by the plaintiff, but is an incumbrance upon the real estate, subject to which the property will be sold if a sale of this lot is made by the plaintiff.

The question most discussed among the parties relates to the request for an instruction to the plaintiff as to which of the parcels of real estate he first shall sell or mortgage, and which of the parcels he thereafter shall sell or mortgage if it becomes necessary to sell a second parcel. The power to authorize such a sale of real estate resides in the Probate Court, under the R. L. c. 146, §§ 6–8. In a proceeding of this kind this court cannot direct or control the Probate Court in its action under these sections. All parties interested join in the prayer of the plaintiff for instructions on this point, and we think the court properly can instruct him as to his action in making an application to the Probate Court. The decision on his application will depend upon the view of that court, dealing with the case as it then is presented.

The testatrix made her son and her brother executors of her will. After providing for the payment of her debts and funeral expenses, and for the disposition and care of her cemetery lots, and after giving to her sister her wearing apparel and the specific legacy already referred to, she gave to her son Dr. Cogswell and her brother Dr. Hall, "their heirs and assigns in fee simple," all her real estate. She then made numerous provisions as to the management and disposition of it, and as to payments to be made from the proceeds of it. Although she did not use the word "trust" or "trustee," we think the effect of the will is to give to Dr. Cogswell and Dr. Hall the legal title to all this property, to be held in trust to manage and finally dispose of it according to the directions subsequently given in the will. In *Hall* v. *Cogswell*, 183 Mass. 521, 523, it is said that the clause giving Dr. Cogswell $6,000 out of the proceeds of the sale "creates a trust or a charge on these two houses."

The double dwelling house numbered 9 and 11 Centre Street, built by the testatrix, is treated by her in different particulars as one estate. She provides that it shall not be sold until the expiration of five years after her decease, and she refers to "the

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balance of the money or estate remaining from the sale of said dwelling houses." In reference to the use to be made of them so long as they remain unsold she considers them separately. Number 9 is to "be used, occupied and enjoyed as and for a home for said Dr. Charles F. Cogswell, Dr. Newbert J. Hall, Helen R. Robinson and her son, John Brooks Robinson, so long as said Dr. Cogswell and Dr. Hall shall own the same." These persons are her son, her brother, her sister and her nephew. She evidently contemplated a use of the property by these relatives as members of one family, living harmoniously together. The property was to be "enjoyed" as a "home." For reasons which do not fully appear, these persons fell into controversy, and litigation has been going on among them ever since the death of the testatrix, which occurred more than six years ago. Three times before the present suits were brought this litigation has been before the full court. See *Hall* v. *Cogswell*, 183 Mass. 521; *Cogswell* v. *Hall*, 183 Mass. 575; *Cogswell* v. *Hall*, 185 Mass. 455. Dr. Cogswell ceased to occupy the house in July, 1900, and John Brooks Robinson gave up his residence there in 1905, and subsequently released and conveyed all his right, title and interest in the estate to Dr. Cogswell. The single justice found that, as long ago as July, 1900, the counsel of Dr. Hall addressed a letter to the counsel of Dr. Cogswell, telling him that Dr. Cogswell would be charged for lodging and care and attention in the house from the expiration of forty days after the death of the testatrix, and stating other things indicating an attitude of hostility in reference to the rights of the parties under the will. The judge also found that Dr. Cogswell left the premises and remained away in consequence of the letter and the strained relations which had arisen between the parties over the settlement of the estate. It is very plain that these beneficiaries cannot occupy and enjoy the house as a home in the way intended in the creation of this part of the trust. It is contemplated by the will that the trustees might sell the property at any time after the expiration of five years. We see nothing in the existing conditions which should make the plaintiff hesitate to apply for a license to sell this part of the house for payment of debts and charges of administration. No reason appears why the plaintiff should not apply for leave to sell the

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other part of this double house for the same purpose, if, as seems likely, the sale of the first would not bring enough to pay debts and charges of administration. Even if it would bring enough, the sale of it would entitle Dr. Cogswell to receive $6,000 which was expected to come from the proceeds of the sale. If the use of these proceeds for the payment of debts would leave a sum insufficient to pay the $6,000, Dr. Cogswell might contend that the other part of the house would need to be sold to make up to him this sum. The fact that under the will he is entitled to receive $6,000 from the proceeds of this sale well may be considered by the plaintiff in determining whether to apply to the Probate Court for the sale of both parts of the house.

Under the trust one third of the net income of the premises on Beacon Street is to be paid to Dr. Hall during his natural life. This indicates an intention of the testatrix that this property should be held and used to produce income during the joint lives of Dr. Cogswell and Dr. Hall. While we have no doubt of the power of the Probate Court to authorize the sale of this property as well as the other if needed for the payment of debts, this provision, as well as the provision for the investment of the proceeds of the sale of the Centre Street houses in other real estate in Brookline or Boston during the lives of all these beneficiaries, shows an intention on the part of the testatrix that the property on Centre Street might be sold at any time after the expiration of five years, and that the property on Beacon Street should be held so long as Dr. Cogswell and Dr. Hall both live. We therefore instruct the plaintiff that it is his duty first to apply for leave to sell or mortgage the property on Centre Street.

It does not appear from the pleadings and agreed facts whether the interests of the beneficiaries will be promoted by selling both parts of the house on Centre Street at the same time, or by selling only one, provided a sale of one would enable the plaintiff to pay all debts and charges of administration. We therefore are unable to instruct the plaintiff on this point. We see no reason why he may not properly make his application in either form as seems to him best.

If there is any surplus in the plaintiff's hands after paying

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debts and expenses out of the proceeds of the sale of real estate, he will of course hold it to be disposed of under the will. At this stage of the proceedings we cannot properly instruct him further on this point. How much he will hold, if anything, and what the conditions may be at that time, we do not know. The trust calls for the maintenance of Helen R. Robinson during her natural life. There is also a provision for an investment of proceeds in real estate to be occupied and enjoyed by the four beneficiaries as a home. Whether the conditions hereafter will be such that this part of the trust can be executed in accordance with the intention of the testatrix we cannot tell.

Upon the facts agreed, Helen R. Robinson, the plaintiff in the first case, is entitled to receive from this property such sum as is necessary to secure for her a suitable and comfortable maintenance during her natural life. It is the duty of the defendants Cogswell and Hall, as trustees holding the property, to provide this maintenance. If they fail to perform this duty the plaintiff can have the trust administered by others who will have regard to her rights. Her case will stand for hearing before a single justice upon an application for an amendment, or otherwise, as she shall be advised.

Upon the acts now appearing the court cannot decree relief to the plaintiff Cogswell in his suit against Hall and others. As it is likely that proceedings by the administrator to obtain money for the payment of debts will materially change the existing conditions, this case may stand for such action, if any, before a single justice as the rights of the parties demand.

So ordered.

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CHARLES C. PITTS, trustee, *vs.* DAVID MILTON & others.

Suffolk. March 21, 1906. — May 17, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, BRALEY, & SHELDON, JJ.

Devise and Legacy. Trust.

A will provided as follows: "I give and bequeath to my beloved wife L. all my real and personal estate wherever situated of which I may die possessed for the purpose of maintaining herself and our children to her and her heirs forever." *Held*, that the widow took an absolute devise in fee simple in the real estate of the testator, and that no trust was created.

BILL IN EQUITY, filed May 15, 1905, by the trustee under the will of Coffin Pitts, who died in 1871, his will being proved on October 23, 1871, to establish a trust in a certain lot of land with the buildings thereon on Belknap Street in Boston, and to compel a conveyance of the property to the plaintiff to be administered under the will of Coffin Pitts free from certain mortgages.

In the Superior Court the case was heard by *Lawton*, J. The defendants claimed under David Milton to whom the property was conveyed on February 26, 1900, by Louisa E. Gilmore, formerly Louisa E. Pitts, the widow of Coffin Pitts. Louisa E. Gilmore was the mother of the plaintiff and of Theresa A. Pitts, and on or about May 7, 1895, conveyed the property to them. On or about January 11, 1897, Charles C. Pitts, the plaintiff, and his sister Theresa A. Pitts, both then being unmarried and of age, reconveyed the property to their mother Louisa E. Gilmore. The will of Coffin Pitts so far as it appears in the record is quoted in full in the opinion.

The judge made a decree dismissing the bill with costs to the defendants. The plaintiff appealed.

E. F. Leonard, (*C. C. Pitts* with him,) for the plaintiff.

W. H. White & M. L. Lourie, for the defendants, were not called upon.

BRALEY, J. In the will of Coffin Pitts this provision is found: "I give and bequeath to my beloved wife Louisa E. Pitts all my real and personal estate wherever situated of which I may die

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possessed for the purpose of maintaining herself and our children to her and her heirs forever," and if by the language used the testator's widow, under whom the defendants derive title, took a fee the plaintiff at the time of bringing suit had no legal or equitable interest to the land described in this bill. At the testator's death his widow and two minor children survived, one of whom was the plaintiff, and as no express trust in favor of either is technically described, if an equitable estate for the benefit of the children was created, it must be found in the words "for the purpose of maintaining herself and our children."

When disposing of his estate he gave all to his wife, and used words of inheritance sufficient to pass a fee in the real property unaided by the provisions of Gen. Sts. c. 92, § 5, which were in force at his death and when the will was admitted to probate. *Smith* v. *Rice*, 183 Mass. 251. It is a rule of construction that ordinarily when a fee is devised the estate of the devisee is not cut down by subsequent language of doubtful import found in other clauses, or in a codicil, but which does not expressly qualify or limit the first devise. *Damrell* v. *Hartt*, 137 Mass. 218. *Bassett* v. *Nickerson*, 184 Mass. 169, 173. The intention of the testator when ascertained must control, and for this purpose the entire clause, which is the only portion of the will appearing in the record, must be considered. *Dana* v. *Dana*, 185 Mass. 156, 158. In stating his general purpose if the qualifying words used had followed instead of preceded the words of inheritance they would not have operated to create a trust for the benefit of the children, for she already had been given an absolute estate, and they can have no greater significance or meaning because interposed before, rather than placed at the end of the sentence. It must be held, therefore, that the widow of the testator, upon probate of the will, became seised in fee of all his real estate. *Spooner* v. *Lovejoy*, 108 Mass. 529. *Aldrich* v. *Aldrich*, 172 Mass. 101.

Under this construction the contention of the plaintiff that the reconveyance by his sister and himself to his mother, who, after they had obtained their majority, conveyed this real estate to them, was for the purpose of again clothing her with the legal title while the equitable title remained in them, ceases to be material. If a trust did not exist under the terms of the will

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none was created by the deed of reconveyance, and she again took an unqualified fee, which by mesne conveyances is now vested in the defendant, Appleton. A consideration, therefore, of the other defences is not required.

Decree affirmed.

N. EMMONS PAINE *vs.* NEWTON STREET RAILWAY COMPANY.

Middlesex. March 21, 1906. — May 17, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, BRALEY, & SHELDON, JJ.

Statute. Street Railway. Jurisdiction. Railroad Commissioners. Words, "Rulings."

By the Resolve of 1896, c. 87, the commissioners appointed to consolidate and arrange the Public Statutes were not authorized to make substantive changes in the statutes but only to suggest "mistakes, omissions, inconsistencies and imperfections" which might appear in the laws and the manner of correcting, supplying and amending them.

The provision of R. L. c. 112, § 100, giving the Supreme Judicial Court or the Superior Court jurisdiction in equity "to review, annul, modify or amend the rulings of any State board or commission relative to street railways as law and justice may require," relates only to rulings of law, and does not apply to findings and decisions upon questions of fact, and in such a proceeding the court can hear no evidence except the proof of the evidence that was before the board when the rulings complained of were made.

At the hearing on a bill in equity filed in the Superior Court under R. L. c. 112, § 100, to review, annul, modify or amend the rulings made by the board of railroad commissioners in approving a street railway location granted by the board of aldermen of a city, the only evidence admissible is the proof of the evidence that was before the board of railroad commissioners when the rulings complained of were made.

BILL IN EQUITY, filed in the Superior Court in its substituted form on May 18, 1905, by a physician maintaining a sanatorium for the treatment of diseases of the nerves at the corner of Fuller Street and Washington Street in Newton, under R. L. c. 112, § 100, to review, annul, modify or amend the rulings of the board of railroad commissioners approving an extension of the street railway tracks of the defendant authorized by the board of aldermen of the city of Newton.

The bill, after various allegations of fact, alleged that at the

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hearing before the board of railroad commissioners the plaintiff requested that board to rule as follows:

"1. That the board of aldermen of the city of Newton did not have jurisdiction of the petition of the Newton Street Railway Company for a grant of said extension.

"2. That the Newton Street Railway Company as a corporation has no authority under the statutes to petition for a grant of an extension in the city of Newton.

"3. That the grant of said extension by the board of aldermen of the city of Newton was illegal and void.

"4. That upon all the evidence said extension or alteration of location as granted or made is not consistent with the public interest.

"5. That upon all the evidence said extension or alteration of location as granted, made, or to be made, creates in said Washington Street a public highway, a public and a private nuisance."

The bill further alleged that the board of railroad commissioners refused to make any of the foregoing rulings requested by the plaintiff and approved the location of the extension granted by the board of aldermen, praying that the rulings of the board of railroad commissioners might be reviewed, annulled, modified or amended as law and justice might require, that the defendant might be enjoined from constructing the extension in accordance with the grant of the board of aldermen and approval and rulings of the board of railroad commissioners until a further order of the Superior Court, that the defendant might be permanently enjoined from constructing the extension on the location and operating its cars thereon, and for further relief.

In the Superior Court the case was heard by *Sheldon*, J. After the opening statement of the counsel for the plaintiff the judge made the following ruling:

"I am disposed to rule in accordance with the contentions of the defendant; that is, to rule that this court has power simply to review, annul, modify or amend rulings of the railroad commissioners on questions of law, and has not the power to hear evidence to alter any of the findings of fact; that the revision of rulings of law must be upon the evidence, and only upon the evidence, which was before the board whose rulings are brought

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in question. You have the right to show what was the evidence before the board of railroad commissioners, but you have not the right to offer any other evidence of the facts that were in issue or that may be deemed to be in issue now. Accordingly, I will exclude all other evidence than evidence of what the evidence was before the board of railroad commissioners when the rulings of which you complain were made."

Evidence afterwards was offered by the plaintiff of matters not before the board of railroad commissioners which was excluded by the judge in accordance with this ruling. A stenographic report of the proceedings before the commissioners was proved and admitted in evidence.

The judge made an order under Chancery Rule 35 appointing a commissioner to take the evidence in the case to be reported to this court. He made a final decree that the bill be dismissed; and the plaintiff appealed.

J. C. Ivy, (*C. S. Ensign, Jr.* with him,) for the plaintiff.

H. W. Dunn, (*E. B. Jackson* with him,) for the defendant.

KNOWLTON, C. J. This is a proceeding in equity brought under the R. L. c. 112, § 100. It is entitled, in the plaintiff's bill, "Petition to annul, modify or amend rulings of the board of railroad commissioners approving an extension of street railway tracks granted to the defendant by the board of aldermen of said Newton." After a statement of the rulings of the board in their refusal to make the rulings requested by the petitioner, the petition contains a prayer that these rulings be reviewed, annulled, modified or amended as law and justice may require, followed by certain other subsidiary prayers.

The statute above referred to is in part as follows: "The Supreme Judicial Court or the Superior Court shall have jurisdiction in equity . . . to compel the observance of and to restrain the violation of all laws which govern street railway companies, and of all orders, rules and regulations made in accordance with the provisions of this chapter, by the board of aldermen of a city, the selectmen of a town, or by the board of railroad commissioners, and to review, annul, modify or amend the rulings of any State board or commission relative to street railways, as law and justice may require." Upon the reading of the petition it is plain that it is brought under this section,

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and that the court has no jurisdiction except that given by this statute.

The first question is whether the word "rulings," near the end of the section, means rulings of law, or includes findings and decisions upon questions of fact. In the first place, by its ordinary meaning it is applicable to decisions upon questions of law, and not to findings upon matters of fact; secondly, in the St. 1898, c. 578, § 25, from which this part of the section is taken without other change, the language is "rulings of law." The commissioners appointed to consolidate and arrange the Public Statutes were not authorized to make substantive changes in the statutes, but only to suggest "mistakes, omissions, inconsistencies and imperfections which may appear in the laws," and the manner of correcting, supplying and amending them. Resolves of 1896, c. 87. There is nothing to show that they intended to change the meaning of this statute, and the fair inference is that the words "of law" after "rulings" were omitted as superfluous. That part of R. L. c. 112, § 100, which allows the petition to be brought by a street railway company or by any interested party, as well as by the mayor and aldermen of a city or the selectmen of a town, was inserted by the Legislature in its action upon the report of the commissioners. For changes of the arrangement of parts of Pub. Sts. c. 113, § 63, St. 1891, c. 293, and St. 1898, c. 578, § 25, see R. L. c. 112, §§ 98, 100.

The contention that "rulings" means rulings of law is strengthened by the fact that a great variety of matters affecting street railway companies are left to State boards and commissions, and especially to the board of railroad commissioners. While it is reasonable that rulings of law upon these matters, entered of record under § 98 of this chapter, should be subject to revision by the courts, it would defeat the main purpose of the statute in creating this board, if its decisions in all matters of fact were subject to revision and reversal by a court. We think it plain, therefore, that this section opens to review only rulings of law, and it follows that the Superior Court rightly refused to hear evidence to prove a different case from that which appeared at the hearing when the rulings were made.

The ruling as to the form of the petition originally presented

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to the board of aldermen, and the sufficiency of the signature upon it, has not been argued before us, and we treat it as waived.*

The fourth ruling requested of the board of railroad commissioners was that the "extension or alteration of location as granted or made is not consistent with the public interest," and the fifth was that it "creates in said Washington Street a public highway, a public and a private nuisance." Both of these propositions involve questions of fact upon which there was ample evidence to sustain the findings of the board of railroad commissioners. Upon the evidence it could not be ruled as matter of law that the extension would constitute a nuisance, and while there were conflicting considerations on the question whether it would be consistent with the public interest, the facts presented by the petitioners for the approval of the location tended strongly to support their petition.

The record shows no erroneous rulings of the board of railroad commissioners, and the bill in the Superior Court was rightly dismissed.

Decree affirmed.

STEPHEN C. LOWE *vs.* MATT B. JONES, administrator, & another.

Suffolk. March 22, 23, 1906. — May 17, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, BRALEY, & SHELDON, JJ.

Trust. Executor and Administrator. Pledge.

A trust cannot be established against the proceeds of trust property wrongfully disposed of by the trustee, which are in the hands of the administrator of his insolvent estate, unless such proceeds can be identified and traced into some specific fund or property.

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* The petition to the board of aldermen was in behalf of the board of directors of the Newton Street Railway Company and was signed "Board of Directors of the Newton Street Railway Company, By Adam A. Claflin, President." It appeared that the petition was presented by authority of a vote of the board of directors. This is the matter referred to in the rulings numbered 1, 2 and 3 which were refused by the board of railroad commissioners. They ruled that the petition was in proper form.

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A trust cannot be declared against the insolvent estate of a deceased person on the ground that the proceeds of trust property wrongfully disposed of by the deceased went into the general assets of his estate and thus increased the amount in the hands of the administrator.

If one holding in trust certain shares of stock wrongfully pledges them to a bank to secure his own debt, and afterwards dies insolvent, the *cestui que trust* cannot compel the administrator of the insolvent estate to use the general assets of the estate to pay in full the debt to the bank to redeem the stock from the pledge, especially where only the trust property is pledged and there is no opportunity to marshal assets in the payment of the debt.

BILL IN EQUITY, filed as amended on November 28, 1905, by Stephen C. Lowe of Boston against the administrator of the estate of Clarence M. Merriam, late of Newton, and the Neponset National Bank of Canton, alleging:

First. That on or about May 8, 1903, the plaintiff authorized Clarence M. Merriam to buy for him fifty shares of the preferred stock of the Boston and Suburban Electric Companies at $87.50 per share on the understanding and arrangement with Merriam that the stock should be held on account of the plaintiff until paid for or ordered to be sold by the plaintiff, and that the plaintiff thereupon paid to Merriam on account of the stock $1,350.

Second. That on or about September 22, 1903, the plaintiff authorized Merriam to buy twenty additional shares of the stock at $79 per share on the same understanding and arrangement as above set forth, and paid Merriam on account thereof the sum of $380.

Third. That on or about February 2, 1904, Merriam represented to the plaintiff that he had purchased for the plaintiff the fifty shares of stock and the twenty shares of stock at the prices and upon the terms and arrangements above set forth, and that the shares of stock were then being held for the plaintiff according to the arrangement and understanding above set forth, and that Merriam then asked the plaintiff for further payments on account thereof, and the plaintiff thereupon paid Merriam on account of the purchases the further sum of $550.

Fourth. That on or about March 17, 1904, Merriam represented to the plaintiff that the shares were still being held for the plaintiff and represented that owing to the condition of the market it was necessary that Merriam should have some further security from the plaintiff on account of the balance of the purchase price, and Merriam requested the plaintiff to give to him

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certain shares of the stock of the Butler Mills to be held as security for the obligation of the plaintiff to pay for the stock; that thereupon the plaintiff believing and relying upon the representations of Merriam delivered to Merriam ten shares of stock in the Butler Mills to be held by Merriam as collateral security on account of the balance of the purchase price of the shares then unpaid for.

Fifth. That on or about April 11, 1905, Merriam died intestate, and on or about April 17, 1905, the defendant Jones was appointed administrator of his estate.

Sixth. That the plaintiff is informed and believes that the ten shares of stock in the Butler Mills are now in the hands of the defendant Neponset National Bank, and are held by that defendant under an alleged lien by reason of the same having been deposited with that defendant by Merriam as collateral security for a loan to Merriam of $500, the proceeds of which loan were received by Merriam and form a part of the assets of his estate now in the hands of the defendant Jones, and the plaintiff says that he is ignorant whether or not Merriam ever in fact purchased the fifty shares and the twenty shares of stock on account of the plaintiff according to the arrangement, but that he is informed and believes that if any such stock ever was bought it has since been sold by Merriam and the proceeds thereof form a part of the assets of the estate of Merriam now in the hands of the defendant Jones; that the plaintiff has never received any of the stock and never has given any order to have the same sold, and the plaintiff further says that at no time since the purchases were alleged to have been made has the market value of the suburban stock fallen as low as the unpaid portion of the purchase price thereof, if the purchases were in fact made as represented by Merriam, and that if the stock was so purchased and has been used or sold by Merriam it was without authority and in fraud of the rights of the plaintiff, and that the plaintiff is not indebted to the estate of Merriam, but on the contrary is a creditor thereof.

And the plaintiff further says that the alleged pledge of the shares of the Butler Mills to the Neponset National Bank to secure the indebtedness of Merriam was unauthorized and was in fraud of the plaintiff's rights, and that the shares were obtained

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by Merriam from the plaintiff for the sole purpose of being held as collateral security for the payment by the plaintiff of the balance of the purchase price of the suburban stock, and if the suburban stock was in fact bought the plaintiff is entitled to have it delivered to him together with the shares of the Butler Mills upon the payment by the plaintiff of the unpaid balance of the purchase price of the suburban stock, and the plaintiff has offered, and hereby does offer, to the defendant Jones to pay the balance of the purchase price upon receiving the suburban stock and the Butler Mills stock, and that the defendant Jones has refused to deliver the same to the plaintiff, and the plaintiff says, that if the suburban stock never was in fact bought then the Butler Mills stock was obtained from him by Merriam upon false and fraudulent representations, and that in any event the alleged use of the stock by undertaking to pledge it as security for the indebtedness of Merriam was in violation of the plaintiff's rights, and was itself a fraud upon the plaintiff, and that as against the estate of Merriam and the defendant Jones the plaintiff is entitled to have the shares of the Butler Mills stock returned to him forthwith.

And the plaintiff further says that he is informed and believes that the defendant Neponset National Bank claims the shares of the Butler Mills as collateral security for the indebtedness of Merriam, and proposes to apply the same to the payment of that indebtedness; and the plaintiff is informed and believes that the defendant Jones has assets of the estate of Merriam more than sufficient to satisfy the indebtedness.

And the plaintiff further says that he is informed and believes that the estate of Merriam has been represented to be insolvent, but that the assets of the estate are sufficient to enable the defendant Jones to pay off the note of Merriam above referred to and to redeem the shares of stock from the lien of the bank.

The prayers of the bill were:

First. That the shares of the Butler Mills may be decreed to be forthwith delivered to the plaintiff.

Second. That if it is determined that the defendant Neponset National Bank is entitled to hold the shares of the Butler Mills as collateral security for the indebtedness of Merriam that then the defendant Jones be ordered and directed forthwith to redeem

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the shares of the Butler Mills from any and all liens by applying to the payment of the indebtedness of Merriam to the Neponset National Bank so much of the other assets of the estate in his hands as may be necessary so to redeem such stock, and thereupon to deliver the shares of the Butler Mills to the plaintiff.

Third. That pending a final decree the defendants may be restrained and enjoined from transferring, assigning, disposing of or in any way dealing with the shares in the Butler Mills or any interests which they respectively may have therein.

Fourth. For further relief.

The defendant Jones demurred to the bill.

In the Superior Court the case came on to be heard upon the amended bill and the demurrer of the defendant Jones thereto, before *Richardson*, J., who after hearing the parties overruled the demurrer, and being of opinion that this order so affected the merits of the controversy that the matter ought, before further proceedings, to be determined by the full court, at the request of the defendant Jones, and with the consent of the plaintiff, reported the case for determination by this court.

Under a stipulation agreed to by all the parties, the note of Merriam and the shares of Butler Mills stock referred to in the bill as held by the defendant Neponset National Bank had been taken up on behalf of the plaintiff without prejudice to any rights of the plaintiff to have the estate of Merriam exonerate the stock and pay off the note, and without prejudice to any rights of the defendant Jones or of the estate of Merriam in the premises. The Neponset National Bank accepted service of the subpoena, but on account of the arrangement above stated took no further part in the proceedings.

The contentions of the defendant Jones in support of his demurrer were stated in the report of the judge as follows:

First. That the bill cannot be sustained as a bill to follow the proceeds of trust property, without further allegations pointing out some specific property or fund into which the proceeds of the pledge of the Butler Mills stock to the Neponset National Bank can now be traced, or further allegations that any such specific fund or piece of property can be pointed out and identified.

Second. That in order to entitle the plaintiff to any relief on

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the theory of exoneration the bill must allege either, (a) that other property belonging to Merriam was pledged with the bank so as to be applicable as security for the same loan which was secured by the plaintiff's stock, and that the combined security was more than equal to the amount of the loan; or (b) that some specific fund or piece of property in Merriam's estate could be identified as representing the proceeds of the loan in question, or as having been acquired or freed from a lien or charge through the transaction by which the complainant's stock was pledged to the bank.

All other grounds of demurrer were expressly waived by the defendant. If the above contentions of the defendant Jones on both aspects of the bill were sound and the demurrer should have been sustained on those grounds, the bill was to be dismissed, without prejudice to the right of the plaintiff to prove his claim against the estate of Merriam as one of the general creditors; otherwise, the defendant was to answer over, and the case was to stand for trial.

H. W. Dunn, (*C. H. Gilmore* with him,) for the defendant Jones.

H. E. Warner, for the plaintiff.

KNOWLTON, C. J. The defendant's intestate, one Merriam, held stock of the plaintiff under an arrangement which established a relation of trust between the parties, and made it his duty to continue to hold it until the conditions should change. It is averred in the bill that he sold a part of it and received the proceeds as his own, and pledged the remainder of it to the defendant bank as security for a loan made to him personally. On the facts averred there is nothing to show that the bank did not take the pledged property in good faith, under such circumstances as would enable it to hold it as security for the loan. Indeed, this part of the stock, with Merriam's note which it was pledged to secure, has been taken up by the plaintiff under a stipulation that the redemption should be without prejudice to the rights of any of the parties. There is no doubt of the plaintiff's right to hold this part of the stock as trust property, except as to the claim of the bank under its loan. Were it not for the bank's claim he could redeem it from the defendant, in accordance with the arrangement under which it was originally held.

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The present contention as to this stock relates only to that part of its value which is represented by the loan. As to that part the rights of the parties are substantially the same as they are in regard to the other stock which Merriam sold in violation of his trust.

The plaintiff avers that Merriam's estate has been represented insolvent, and he seeks to establish a trust against the general assets of the intestate in the hands of the administrator, in such a way as to obtain the full value of the stock to the corresponding diminution of the amount to be divided among the creditors. All the stock that was sold and the interest of the bank in that which was pledged have gone into the hands of holders in good faith for a valuable consideration. The plaintiff therefore cannot obtain it in specie. His only right, if he has any beyond that of the general creditors, is to follow the money received on account of it, and establish his trust against that.

The rule stated in some of the early cases that a trust cannot be enforced against money mingled with other money in a common fund, because money has no ear marks, has been relaxed, and it is now held that if the proceeds of trust property can be traced into a particular fund, the trust may be established and enforced as a charge upon the fund. This principle has often been recognized both in England and America. A leading case on this subject is *In re Hallett's estate*, 13 Ch. D. 696. The opinions in this case have sometimes been understood as carrying the law further in the direction of following proceeds to enforce a trust than it was actually carried. As a consequence, there have been decisions in some of the American States to the effect that, if one's general estate has been enriched by the proceeds of trust property, the trust may be established against the general assets even though the estate is insolvent. See *McLeod* v. *Evans*, 66 Wis. 401; *Davenport Plow Co.* v. *Lamp*, 80 Iowa, 722; *Myers* v. *Board of Education*, 51 Kans. 87; *Carley* v. *Graves*, 85 Mich. 483, 487. But these cases have all been either expressly overruled or greatly limited and qualified. *Nonotuck Silk Co.* v. *Flanders*, 87 Wis. 237. *Burnham* v. *Barth*, 89 Wis. 362, 366. *Bradley* v. *Chesebrough*, 111 Iowa, 126. *Marquette Fire Commissioners* v. *Wilkinson*, 119 Mich. 655, 670. *Travellers' Ins. Co.* v. *Caldwell*, 59 Kans. 156. *Kansas State Bank* v. *First State*

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Bank, 62 Kans. 788. In some States it is held that, while it is not enough to show that trust property went into the general assets, it is enough to charge the whole estate with a trust, if it can be shown that the proceeds remain unexpended somewhere in the estate. See *Slater* v. *Oriental Mills*, 18 R. I. 352, 353; *Bradley* v. *Chesebrough*, 111 Iowa, 126; *Hopkins* v. *Burr*, 24 Col. 502; *Pearson* v. *Haydel*, 90 Mo. App. 253, 264; *Lincoln* v. *Morrison*, 64 Neb. 822. But by the great weight of authority, a trust cannot be established against the proceeds of trust property which has been disposed of, unless the proceeds can be identified and traced into some specific fund or property. This is the doctrine of *In re Hallett's estate*, to which we have already referred. In the later case of *In re Hallett*, [1894] 2 Q. B. 237, 244, it was said in the opinion: "There is nothing in our decision in the present case which is in conflict with the decision in *In re Hallett's estate*. In order to follow trust money, there must be specific property capable of being identified, into which the money has been converted, and in that case this doctrine was applied in this way; it was said that, where a trustee pays his own money and also trust money into his banking account, it is the same thing as though he had placed them in a box, and his drawing for his own purposes must be assumed to be out of his own money. That decision in no way qualifies the rule that there must be a specific thing capable of being followed." See also *In re Stenning*, [1895] 2 Ch. 433; *In re Oatway*, [1903] 2 Ch. 356. The rule in Massachusetts has always been held, with considerable strictness, to require the identification of the trust property as passing into some other specific property or fund, as distinguished from the general assets of one's estate. *Howard* v. *Fay*, 138 Mass. 104. *Attorney General* v. *Brigham*, 142 Mass. 248. In *Little* v. *Chadwick*, 151 Mass. 109, this court said: "When trust money becomes so mixed up with the trustee's individual funds that it is impossible to trace and identify it as entering into some specific property, the trust ceases. The court will go as far as it can in thus tracing and following trust money; but when, as a matter of fact, it cannot be traced, the equitable right of the *cestui que trust* to follow it fails. . . . There is nothing to the contrary in *National Bank* v. *Insurance Co.* 104 U. S. 54, 66–71, and in *In re Hallett's estate*, 13 Ch. D.

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696, 708–721, which are chiefly relied on by the annuitants. In Wisconsin a majority of the court has declared that it is not necessary to trace the trust fund into any specific property in order to enforce the trust; and that if it can be traced into the estate of the defaulting agent or trustee, this is sufficient. *McLeod* v. *Evans*, 66 Wis. 401, 409. But this seems to us to be stated too broadly." We have already seen that this case in Wisconsin has been overruled.

The great weight of authority both in England and America is in accordance with the rule in *Little* v. *Chadwick*, above stated. *Lebanon Bank's assigned estate*, 166 Penn. St. 622. *Marquette Fire Commissioners* v. *Wilkinson*, 119 Mich. 655, 670. *Hauk* v. *Van Ingen*, 196 Ill. 20, 39. *Ellicott* v. *Kuhl*, 15 Dick. 333. *Ober* v. *Cochran*, 118 Ga. 396. *In re Mulligan*, 116 Fed. Rep. 715, 717, 718. *Burnham* v. *Barth*, 89 Wis. 362. *Northern Dakota Elevator Co.* v. *Clark*, 3 No. Dak. 26, 30. *Cushman* v. *Goodwin*, 95 Maine, 353. *Rockwood* v. *School District*, 70 N. H. 388. *Peters* v. *Bain*, 133 U. S. 670, 678, 693. *Frelinghuysen* v. *Nugent*, 36 Fed. Rep. 229, 239. *Holmes* v. *Gilman*, 138 N. Y. 369, 376. *In re Hicks*, 170 N. Y. 195, 198, and English cases above cited.

All that is averred in the present case is that the proceeds "were received by said Merriam and form a part of the assets of his estate now in the hands of said respondent Jones." This is equivalent to a statement that the proceeds in the form of money came into the hands of Merriam, and cannot be traced further, although the plaintiff avers that they were not paid out, but went to increase the assets of the estate.

Where money is received and mingled with one's general property by the holder, and used as his own, there would be great difficulty, in most cases, in showing that none of it was expended or used to pay debts, if it were held for any considerable time. Moreover, if it is impossible to trace the money into any fund or investment, and it becomes part of the general assets of the holder, which assets perhaps have changed their form in a variety of ways after the receipt of the money, it would be impossible to enforce a trust, unless it were established against every variety of property belonging to the holder, including debts, choses in action, and other things which it is not easy to

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make the subject of a trust. In the settlement of an insolvent estate there would be little equity in preferring this kind of claim, as against other creditors some of whose claims might be quite as meritorious, and founded on as great a violation of private rights as that of the *cestui que trust*. Except in cases of the insolvency of the trustee, the right to establish a trust against his estate is of no consequence, for all that could be obtained in such a case would be the value of the trust property, or its proceeds, and that can always be collected of the trustee if he is solvent. For different reasons we think the rule stated in *Little* v. *Chadwick*, *ubi supra*, should be followed, and that a trust should not be declared against the insolvent estate of a deceased person on the ground that the proceeds of trust property went into the general assets, and thereby increased the amount in the hands of the administrator.

The contention of the plaintiff, that the administrator should be compelled to use the general assets of the estate to exonerate the stock in the possession of the bank from its liability for the bank's debt, is simply another way of urging that the general assets of the intestate are impressed with a trust, to the amount of the loan received by the intestate. Unless they are so impressed they cannot be taken from the general creditors and used for the redemption of the trust property in the hands of the bank. The case of *Ex parte Alston*, L. R. 4 Ch. 168, has no application to this contention. That was a case of marshalling assets which had been pledged for a debt of the bankrupt. The pledge included trust property and other property of the bankrupt. It was decided that the other property held in pledge must all be applied to the payment of the debt, to the exoneration of the trust property. In the present case the only property pledged was trust property, and there is no opportunity to marshal assets in the payment of the debt from the proceeds of the pledged property.

Bill dismissed, without prejudice to the right of the plaintiff to prove his claim against the estate.

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JOHN J. HALLORAN *vs.* WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.

Worcester. March 26, 1906. — May 17, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, BRALEY, & SHELDON, JJ.

Negligence. Street Railway.

In the use of a street of a city the motorman of an electric car and the driver of a vehicle not running on a track each is bound to use due care to avoid coming in contact with the other, and neither is entitled to assume that the other will keep out of his way.

In an action against a street railway company for personal injuries from a collision between a car of the defendant and a wagon in which the plaintiff was seated beside the driver, the plaintiff and the driver testified that as they approached a street, which entered the one they were on at a sharp descending grade and on which ran cars of the defendant, they were going about four miles an hour, that before crossing the street the driver "slowed up," that both looked and saw no car approaching, and listened and heard nothing. The driver further testified that he first saw the car approaching when his horse's feet were between the rails of the track, that he turned his horse to the left and the car struck the left front wheel. At the corner of the intersecting street on the side from which the car approached there was a large brick factory which cut off the view of the car tracks. There was a conflict of evidence as to whether the gong was sounded and as to the speed of the car. The plaintiff testified that "the car was coming at a great speed." The driver testified that "it was going at a pretty fast clip." *Held*, that the questions of the due care of the plaintiff and the negligence of the defendant were for the jury.

LATHROP, J. This is an action of tort for personal injuries sustained by the plaintiff in consequence of a wagon in which he was seated beside the driver being struck by an electric car of the defendant. At the close of the evidence for both sides, the judge of the Superior Court who heard the case directed a verdict for the defendant, and the case is before us on the plaintiff's exceptions.

The accident occurred soon after one o'clock in the afternoon of December 17, 1903, at the junction of Piedmont Street and Chandler Street in Worcester. The former street is on a level grade and runs north and south. The latter street has a sharp descending grade towards Piedmont Street, and runs east and west. On Chandler Street is a line of the defendant's tracks. Shortly before the accident the plaintiff had been invited by the

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driver of the wagon to get upon it. It appeared in evidence that upon the corner of Piedmont Street and Chandler Street, on the side from which the defendant's car approached, there was a large brick factory, and that it was impossible for one proceeding in the direction in which the plaintiff was going, to obtain a view of Chandler Street and the car tracks of the defendant The distance from the building to the nearest rail was about fourteen feet.

There was evidence that the car struck the left front wheel of the wagon. Both the plaintiff and the driver testified that while on Piedmont Street they were going about four miles an hour; that before crossing Chandler Street "the driver slowed up"; that both looked and saw no car approaching, and listened but heard nothing. The driver further testified that as the seat of the wagon passed the cross walk on Chandler Street over Piedmont he first saw the car approaching, and at that time his horse's feet were between the rails of the track; that he turned his horse to the left, and the car struck the wheel.

There was a conflict of evidence as to the speed of the car,* and as to whether the gong was sounded.

We are of opinion on the evidence in the case that the questions of due care on the part of the plaintiff and the driver of the wagon, and of negligence on the part of the motorman of the car were for the jury.

In *Scannell* v. *Boston Elevated Railway*, 176 Mass. 170, 173, it is said: "With some exceptions, pointed out in *Driscoll* v. *West End Street Railway*, 159 Mass. 142, 145, and which are not material to this case, the defendant stands in respect to the use of the street on exactly the same footing as the driver of any other vehicle. Each is bound to use due care to avoid coming in contact with the other, and neither is entitled to assume that the other will keep out of his way."

The general rule where a collision occurs between an electric car and a wagon at intersecting streets is to leave the questions of due care on the part of the plaintiff and of negligence on the

* The plaintiff testified: "The car came thundering down the street. I mean by that the car was coming at a great speed." The driver testified "that he could not state how fast the car was approaching, but that it was going at a 'pretty fast clip.'"

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part of the defendant to the determination of the jury. *Lahti* v. *Fitchburg & Leominster Street Railway*, 172 Mass. 147. *Kelly* v. *Wakefield & Stoneham Street Railway*, 179 Mass. 542. *Evensen* v. *Lexington & Boston Street Railway*, 187 Mass. 77. *McCarthy* v. *Boston Elevated Railway*, 187 Mass. 493. *Orth* v. *Boston Elevated Railway*, 188 Mass. 427.

Of course the burden of proof is on the plaintiff in these cases to show due care on his part and negligence on the part of the defendant; and if there is no evidence of such care on his part or of negligence on the part of the defendant, the plaintiff is not entitled to recover, and this may be ruled as matter of law. The defendant relies upon four cases: *Kelly* v. *Wakefield & Stoneham Street Railway*, 179 Mass. 542; *Hurley* v. *West End Street Railway*, 180 Mass. 370; *Dunn* v. *Old Colony Street Railway*, 186 Mass. 316; and *Donovan* v. *Lynn & Boston Railroad*, 185 Mass. 533. In the first of these cases the question of the plaintiff's due care was held to be for the jury. In the second and third cases, the evidence showed that the plaintiff exercised no care whatever, and it was held that the plaintiff could not recover. In the last case a woman attempted to cross the street railway tracks ten feet in front of an electric car, and it was held that she could not recover. The case at bar is clearly distinguishable.

Exceptions sustained.

J. R. Thayer, A. P. Rugg & H. H. Thayer, for the plaintiff.

F. H. Dewey, C. C. Milton & C. Bullock, for the defendant.

MAYOR AND ALDERMEN OF WORCESTER *vs.* WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.

Worcester. March 27, 1906. — May 17, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, BRALEY, & SHELDON, JJ.

Street Railway. Estoppel. Equity Jurisdiction. Words, "Restrictions."

A street railway by complying with the terms of a condition imposed by its grant of location from the aldermen of a city does not lose the right to contest the legality of the condition.

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Restrictions imposed by an order of the board of aldermen of a city granting a location to a street railway company under Pub. Sts. c. 113, § 7, that "said company shall lay and maintain paving in and outside of its tracks as follows:" followed by specifications requiring certain kinds of paving "to be laid and maintained" between the rails and for twelve or eighteen inches outside the tracks on certain streets named, and that on two other streets named "the street shall be paved with blocks for the entire width between the curb lines," requires that the paving on the last named streets shall be maintained as well as laid.

The board of aldermen of a city in granting a location to a street railway company under Pub. Sts. c. 113, § 7, have power to impose restrictions requiring the company to pave and maintain in repair the entire surface of streets in which the tracks of its railway are laid, thus exceeding the requirements of § 82 of the same chapter in regard to the portions of streets to be kept in repair by street railway companies.

An obligation to keep in repair the surface of streets in which the tracks of a street railway are laid, imposed on the company by the aldermen of a city under Pub. Sts. c. 113, § 7, in its original grant of location, is preserved and kept in force by St. 1898, c. 578, §§ 11, 18, now R. L. c. 112, §§ 44, 7.

The obligation of a street railway company to maintain in repair the surface of certain streets imposed by the aldermen of a city in its original grant of location under Pub. Sts. c. 113, § 7, will be enforced specifically in a suit in equity brought by the mayor and aldermen of the city under R. L. c. 112, § 100.

BILL IN EQUITY, filed in the Supreme Judicial Court on July 21, 1905, by the mayor and aldermen of the city of Worcester against the Worcester Consolidated Street Railway Company under R. L. c. 112, § 100, to compel the defendant to put in proper repair the pavement upon certain streets in the city of Worcester as required by the terms and restrictions of the original grant of location granted by the plaintiffs on December 8, 1890, to the Worcester, Leicester and Spencer Street Railway Company, one of the predecessors of the defendant.

Among the terms and restrictions imposed by the order granting the location above mentioned, in the second paragraph of the third section were the following:

"Said company shall lay and maintain paving in and outside of its tracks as follows: On Park and Southbridge streets which are already paved, block paving shall be laid and maintained between the rails and for a distance of twelve inches (12″) outside of the track. On Salem Street or Square, Portland, Madison and Hammond streets, block paving shall be laid and maintained between the rails for a space of eighteen inches (18″) outside of the tracks. On Main and Leicester streets, where there are now two horse railroad tracks, the street shall be

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paved with blocks for the entire width between the curb lines. On all other streets covered by this location, cobblestone paving shall be laid between the rails, and flag-stones eighteen inches (18″) wide upon the outside of the track."

The defendant demurred to the bill and assigned the following causes of demurrer:

1. For that the city of Worcester, as a municipal corporation, has no interest in the subject matter of the bill and has no power or control over the defendant, and that the defendant does not owe any duty, and is under no obligations imposed by law, to the city of Worcester.

2. For that the board of mayor and aldermen exceeded their authority in attempting to impose, and had no authority to impose, under the laws in force at the date of granting the location of the defendant's tracks, the term or restriction that the defendant should lay block paving in any portion of any street occupied by its tracks under the order of location.

3. For that at the date of the granting of the location the general laws then in force provided as to the extent of the duty of street railway companies in the matter of paving and repairing streets, and the board of mayor and aldermen had no authority to impose the term or restriction that the defendant should maintain block paving, or any other form of paving or surface material, in any portion of such of said streets as are paved, except the portion of said streets occupied by the defendant's tracks, nor in the case of such streets as are unpaved in any portion thereof except the portion occupied by the defendant's tracks and eighteen inches on each side of the portion so occupied by the defendant's tracks.

4. For that by the general laws now in force the defendant is not required to keep any portion of the surface material of streets, roads and bridges in repair.

5. For that it is the duty of the city of Worcester, and the proper officers of that city, to keep in repair at the expense of the city, highways, townways, streets, causeways and bridges, so that the same may be reasonably safe and convenient for travellers at all seasons of the year.

6. For that the Great and General Court, from which the defendant derived its charter and all its corporate powers, has

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by statute relieved the defendant of any duty to keep in repair any portions of streets which it was formerly by law required to keep in repair, and has substituted for such duty a commutation tax or excise tax, a part of which is payable to the city of Worcester, and if the part of the excise tax so payable to the city of Worcester is not sufficient to yield to that city an amount equal to the cost to the city of the work done by it, which it was not by law previously required to do, the Great and General Court has in that statute provided a method for increasing the amount of such tax payable to the city.

7. For that it nowhere appears in the petitioners' bill that the defendant has not duly and punctually paid the excise tax in the manner provided by law.

8. For that it nowhere appears in the petitioners' bill that the portion of the excise tax above referred to has not been sufficient to yield to the city of Worcester the cost of all work done by it, which before the passage of St. 1898, c. 578, the city was not required by law to do.

9. For that there does not appear from the bill to be in the order of location any term or restriction requiring the defendant to maintain any paving on Main and Leicester Streets, or on any of the other streets covered by the location, except on certain portions of Park and Southbridge Streets, where the order of location provides "block paving shall be laid and maintained between the rails and for a distance of twelve inches outside of the tracks," and on certain portions of Salem Street or Square, Portland, Madison and Hammond Streets, where the order of location provides "block paving shall be laid and maintained between the rails and for a space of eighteen inches outside of the tracks."

10. For that it appears by the bill that the paving purporting to be required by the order of location has all been satisfactorily performed by this defendant or its predecessors.

11. For that the plaintiffs have not set out in their bill any facts which entitle them to relief.

The case came on to be heard on July 25, 1905, before *Barker*, J., who reserved it upon the bill and demurrer for determination by the full court, with an agreement of the parties that if the demurrer was sustained the bill was to be

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dismissed, and if the demurrer was overruled the defendant might file an answer and the case should stand for hearing on the merits before a single justice.

B. W. Warren, (*C. R. Lamson* with him,) for the defendant. The defendant does not contend that the word "restrictions" contained in Pub. Sts. c. 113, § 7, is not broad enough to include maintenance requirements, nor that the specific requirement by the Legislature in § 32 as to the parts of the streets to be maintained in repair by street railway companies negatives the delegation to local authorities of power to impose such requirements. The defendant's contention is that on well known principles of statutory construction, viz.: (a) the history of the statute, and (b) its contemporaneous interpretation, no such power was, as a matter of law, delegated. For the propriety of such a construction see *Simpson* v. *Story*, 145 Mass. 497; *Blake* v. *National Banks*, 23 Wall. 307; *Church of Holy Trinity* v. *United States*, 143 U. S. 457, 464; and *Binns* v. *United States*, 194 U. S. 486.

(a) History of the Statute. The origin of the power to grant conditional locations is found in St. 1864, c. 229, § 14. The same statute contains in § 18 the origin of Pub. Sts. c. 113, § 32. This legislative requirement created by St. 1864, c. 229, § 18, was enlarged by St. 1866, c. 286; diminished, and varied according to the character of the streets, by St. 1871, c. 381, § 21; confined to surface material only by St. 1881, c. 121; and re-codified by Pub. Sts. c. 113, § 32. During the entire period of these changes the power originally given to locate subject to restrictions remained unchanged.

When the Legislature declined, in 1864, to delegate to local authorities the power to impose maintenance requirements, by rejecting the amendment, then offered, that the part of the streets to be kept in repair should be such "as shall be deemed just and equitable by the mayor and aldermen of cities and selectmen of towns," which amendment, if adopted, would have delegated the exact power alleged to exist in this case, (Leg. Doc. of 1864, House 185,) the Legislature showed that it intended itself equitably to adjust the amount of street maintenance work to be done by street railway companies. This purpose is further shown by the report on the petition on which

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St. 1866, c. 286, was passed, summarizing that petition as "asking for a law to authorize the city to impose a tax on horse railroad corporations to cover the increased cost of keeping the streets in repair." (Senate Doc. 226 of 1866.) By St. 1871, c. 381, §§ 58, 60, limiting all rights and liabilities of street railway companies to the provisions of that statute, this legislative intention was again affirmed.

(b) Contemporaneous Construction. In 1871 the companies running into Boston represented over four fifths of the total length of street railways and over nine-tenths of the total business done by such companies. From Boston Pub. Doc. 100 of 1895 it appears that three hundred and thirty-nine locations were granted after St. 1871, c. 381, of which only four contained any mention of street repairs, and those merely called for compliance with the general law. This construction of the law, shown by the conduct of the Boston aldermen, is confirmed by the Attorney General's Report, January, 1901, p. 61, by 19 Railroad Commissioners' Report, 173, 174, by 27 Railroad Commissioners' Report, 111, and by Report of Redfield, Commissioner, to this court, Suffolk County Clerk's office No. 312 of 1863.

A. P. Rugg, for the plaintiffs.

BRALEY, J. The demurrer admits the substantial allegations of the bill, by which without rehearsing its entire statutory title the defendant is described as a corporation duly organized to operate, and actually operating a system of street railways a part of which is located within the municipal limits of the city of Worcester. By purchase it has lawfully succeeded to all the rights and franchises formerly granted to the Worcester, Leicester and Spencer Street Railway Company, one of its predecessors in title. St. 1893, c. 338. St. 1897, c. 269. At the date of transfer the tracks of this railway were laid, and the road operated in the public ways described in the bill under an original location regularly granted by the board of aldermen subject to certain restrictions, which, among other provisions not involved in the present controversy, required the company to lay and maintain paving within these streets according to certain specifications to which we shall refer later. Whatever questions may now arise over the construction or validity of

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this part of the order, the company complied with its terms, although by compliance neither it nor the defendant is estopped to contest its legality. *Keefe* v. *Lexington & Boston Street Railway*, 185 Mass. 183, 185. Under the construction most favorable to the defendant the company was to assume the expense of paving where the streets were unpaved, for the full width of two streets, and between the track or tracks, and for a limited distance outside of the rails as to the remaining streets, and also to repave with the same material the streets already paved, but the surface of which would have to be removed in the construction of its roadbed. This section of the order, however, is more comprehensive, for the opening words of the second paragraph, "shall lay and maintain paving," indicate a broad purpose, and to overcome their inclusiveness the defendant contends that by the particular description of streets, and the kind of pavement to be used that follows, this general requirement is limited to paving only, and excludes the cost of subsequent maintenance. If one of the objects to be accomplished was the original paving, or repaving of these streets, their subsequent maintenance would call also for an expenditure by the city to keep them in proper repair. That by reason of their use by the company they would be subjected to an increased servitude, which ordinarily would require more frequent or extensive repairs entailing corresponding expense, well may have been considered by the board when settling the conditions of the grant.

If possible all the terms of a written instrument are to be given effect, and this sentence may be considered as fairly indicative of the final determination of the aldermen, while the sentences which follow are to be viewed as in the nature of specifications defining the quality of the material and the extent of the work, and, although in one instance repeated, to declare in connection with each group of streets that when laid the pavement should be kept in repair by the company was unnecessary as this general provision already had been sufficiently stated. Even if there was a seeming repugnancy between the principal and subordinate clauses, the last would have to yield, because if given the effect for which the defendant contends these clauses would defeat the plain purpose which had been

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already sufficiently declared. *Morrill & Whiton Construction Co.* v. *Boston*, 186 Mass. 217, 220. It also is a principle of construction that if uncertain or ambiguous terms are found in a statute or written instrument conferring a public grant they are construed strictly against rather than in favor of the grantee, and, unless by omission of all reference to the subject or by an explicit statement to the contrary, the city should not be required to assume a more onerous burden when manifestly intending to place it upon the company, unless expressed by the order in unmistakable language, which we do not find. *Commissioners on Inland Fisheries* v. *Holyoke Water Power Co.* 104 Mass. 446, 449. *Attorney General* v. *Jamaica Pond Aqueduct*, 133 Mass. 361, 365. *Commonwealth* v. *Boston Terminal Co.* 185 Mass. 281, 287.

The position, however, is taken that if this construction is adopted the obligation imposed either to pave or to maintain is unenforceable as the board of aldermen were not empowered to impose such restrictions, or to exact their performance, and the most important part of the able and learned argument of counsel for the defendant is addressed to this question. When the location was granted, Pub. Sts. c. 113, was the law governing such grants. Under the provisions of § 7 the board of aldermen and selectmen of towns were authorized to grant original locations to street railway companies subject to such "restrictions" as they deemed the public interest required. This word is used in connection with a grant of an interest in real property in a sense analogous to "conditions," and either term may denote a limitation upon the full and unqualified enjoyment of the right or estate granted. *Skinner* v. *Shepard*, 130 Mass. 180. *Ayling* v. *Kramer*, 133 Mass. 12. *Clapp* v. *Wilder*, 176 Mass. 332. In the St. of 1898, c. 578, § 26, which repealed Pub. Sts. c. 113, § 7, this construction was apparently adopted by the Legislature in § 13 as "restrictions" disappear, and the phrase "terms, conditions and obligations" is substituted. But even if having this legal and statutory signification, the inquiry whether the conditions could be legally incorporated with the order of location by way of regulating the manner in which the franchise was to be enjoyed is not changed. It was not until the St. of 1864, c. 229, that the first general law con-

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cerning street railways was enacted. The earlier acts granting charters of incorporation usually contained provisions more or less general as to any obligation of the corporation to keep the highways in which tracks were laid in repair. Of this class of requirements the act incorporating the Worcester Horse Railroad Company, to whose franchise the defendant has succeeded, is fairly typical. St. 1861, c. 148. But the St. of 1864, c. 229, § 18, defined and imposed such an obligation on all companies, and since then as this system of convenient transportation has developed, requiring greater solidity of construction with heavier equipment, especially since the change in motive power from horses to electricity, further consideration has been given to the subject, and corresponding legislation from time to time has been passed. St. 1866, c. 286. St. 1871, c. 381, § 21. Pub. Sts. c. 113, § 32. St. 1898, c. 578, § 15. R. L. c. 112, § 44. The St. of 1871, c. 381, being a general act concerning street railway corporations, codified previous statutes. In § 14 under the subordinate title of location of road, re-enacted in Pub. Sts. c. 113, § 7, with a marginal designation of like import, is found the origin of the right then expressly given to grant a restricted or conditional location. The nature of such restrictions not having been specifically defined, the defendant argues that by implication an obligation to replace or to maintain in repair by any method the surface of the street, whether paved or unpaved, was not included, as this duty, so far as deemed expedient, was already specified and imposed in § 21 of the original act and by Pub. Sts. c. 113, § 32, and consequently the Legislature never intended to delegate authority to impose additional requirements. But the context of § 7 is extensive, for the restrictions are to be such as "the interests of the public may require," and are unlimited in scope. The law making power well might say we have prescribed generally certain conditions as to the repair of the public ways with which street railway companies must comply, but if when granting a location the local authorities are convinced that the latter section is inadequate to equitably adjust and establish the extent of the burden of placing, and thereafter keeping, the surface of the streets in suitable repair owing to the increased wear to which they are subjected by the company, and that more burdensome restrictions are

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required for the benefit of the city or town or of the travelling public, they may be imposed by them. There is no inconsistency under this construction between the two sections, which thus are brought into harmony, for if § 7 is first in ordinal number, still it may be treated as supplementary to § 32 for the purpose of ascertaining the intention of the Legislature. *Opinion of the Justices*, 22 Pick. 571, 573. *Commonwealth* v. *McCaughey*, 9 Gray, 296, 297. *Commonwealth* v. *Boston Terminal Co.* 185 Mass. 281.

If the primary duty of maintaining the public ways within their limits in proper repair never shifts from a city or town, yet in granting a franchise the acceptance of which is not compulsory, the aldermen or selectmen in the exercise of a reasonable discretion and judgment could require under § 7, as a condition, that a more extensive share in the expense of repairing such ways when occupied by its tracks, than that required by § 32, should be borne by the petitioning company. The entire requirements of the third section of the order accordingly must be held as having been within the jurisdiction of the board of aldermen, and therefore valid. *Newcomb* v. *Norfolk Western Street Railway*, 179 Mass. 449. *Selectmen of Gardner* v. *Templeton Street Railway*, 184 Mass. 294. *Selectmen of Hyde Park* v. *Old Colony Street Railway*, 188 Mass. 180. *Selectmen of Wellesley* v. *Boston & Worcester Street Railway*, 188 Mass. 250, 253.

But it is further cogently argued that the St. of 1898, c. 578, now R. L. c. 112, § 7, which repealed Pub. Sts. c. 113, § 7, did not recognize or ratify the validity of original orders requiring the surface construction of streets, or of their subsequent maintenance, and which had been passed under the authority of previous statutes, and consequently since the passage of this act the order in this particular becomes a nullity. Upon reference to this statute it is expressly declared by § 11 that "street railway companies . . . shall remain subject to all legal obligations imposed in original grants", and by § 13, reference again is made to the same subject in the last paragraph, which ratifies and confirms all previous locations which are given validity as if granted under the repealing act. It also recognizes such orders as being in full force and effect subject only to the power of revocation under certain conditions conferred by § 17, upon

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boards of aldermen and selectmen. R. L. c. 112, § 7. Instead of destroying conditional locations of this character they were explicitly preserved. *Selectmen of Hyde Park* v. *Old Colony Street Railway*, *ubi supra*.

Under R. L. c. 112, § 100, this court is given jurisdiction in equity to enforce the order on which the petitioners rely, and a case for equitable relief having been stated the defendant's demurrer must be overruled. *Newcomb* v. *Norfolk Western Street Railway*, *ubi supra*.

Decree accordingly.

JAMES DALEY *vs.* INHABITANTS OF WATERTOWN.

Middlesex. March 28, 1906. — May 17, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, BRALEY, & SHELDON, JJ.

Municipal Corporations. Nuisance.

If a town, acting through its selectmen as its agents, in order to drain certain land taken by the town in widening a street under an order of the county commissioners, digs a ditch through the land of a private owner with his permission connecting with a drain already laid through his land, and thereby turns surface water from its natural course into a shallow pond with no outlet, causing it to overflow and flood a private way and the cellar of a landowner on the opposite side of the way, the landowner may recover from the town for the injury caused by the nuisance thus created.

TORT against the town of Watertown to recover damages for injury to the plaintiff's land and dwelling house on a private way leading into Arlington Street in that town resulting from the discharge of large quantities of water, dirt and filth upon the plaintiff's property, alleged to have been caused by the wrongful acts of the defendant. Writ dated November 20, 1902.

In the Superior Court the case was tried before *Aiken*, C. J., who at the close of the evidence submitted the case to the jury for the assessment of damages only. The jury assessed the damages of the plaintiff in the sum of $675, and the Chief Justice thereupon directed a verdict for the defendant and reported the case for determination by this court, with a stipulation of the par-

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ties that if the direction was wrong judgment should be entered for the plaintiff in the sum of $675 as found by the jury, and that if the direction was right judgment should be entered for the defendant upon the verdict.

James J. McCarthy, for the plaintiff.

J. E. Abbott, for the defendant.

KNOWLTON, C. J. The plaintiff is the owner of a house and lot in Watertown, fronting on a private way twenty feet wide leading into Arlington Street. He built this house in May, 1891. Across the way is a shallow pond with no outlet, called Puffer's Pond, the nearest part of which is seventy feet distant from the plaintiff's land. In its natural condition its surface is seven and fifty-eight one hundredths feet below the bottom of the cellar of the plaintiff's house. Previously to February 28, 1902, the pond had not overflowed the private way or the plaintiff's land, or caused him any inconvenience in the use and enjoyment of his property. On that day it overflowed its natural boundaries, and rose to such a height that on March 1 the private way and about three fourths of the plaintiff's land were covered with water, which entered the cellar of the dwelling house and filled it to a depth of from three to four feet. The water was very filthy. It receded but slowly and remained in the cellar for about a week, and caused serious damage to the house. There was also evidence that again, in 1903, the pond overflowed and covered a part of the plaintiff's lot, and it also in 1904 and 1905 covered a portion of the private way and a small part of the lot near the way. On the first occasion of the overflow the water covered the lots of many other persons and entered outhouses and privies erected on these lots, and the cellars and a basement of other houses.

In the year 1901 the defendant town, acting under an order of the county commissioners, did the work of widening Belmont Street in that part which lay within the boundaries of the town, and changed the direction of the flow of surface water over a part of the land which was added to the street. Some years previously to the date of the order of the county commissioners the defendant town had constructed, and has ever since maintained, a fifteen inch pipe drain connecting with an open ditch from the corner of Arlington and Belmont Streets, to carry water from

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the streets through land of Joshua Coolidge, a distance of two hundred feet or more, to Puffer's Pond. On May 14, 1901, the defendant obtained from Coolidge a license in writing to continue the use of this drain, and, if necessary, to construct a new drain over his land, to carry the water to Puffer's Pond. There was evidence from Coolidge that the natural course of the drainage of the land added to Belmont Street was in another direction, to a larger pond called Bird's Pond.

The defendant's superintendent of streets and town engineer testified to having taken levels and made plans for the drainage of Belmont Street, and he said that, in his opinion, the natural discharge of water from that street would be into Bird's Pond. He also testified that he ran levels for a drain to discharge this water down Arlington Street into Sawin's Pond, and thence to the Charles River, and made a report thereof, with an estimate of the cost, to the selectmen, but they decided to have the water discharged into Puffer's Pond, and obtained the license from Coolidge.

The evidence well warranted a finding that the overflow of water from Puffer's Pond caused a nuisance, to the damage of the plaintiff and other property owners, and that this was chiefly due to the inflow of water through the drain and ditch which the defendant town maintained. The evidence plainly shows that the responsibility for the construction and maintenance of this drain was upon the town, through the selectmen acting as its agents, and not upon the superintendent of streets as a public officer.

The remaining question is whether the construction of the drain was in violation of private rights. The right of the town to construct the way under the order of the commissioners could give it no right to lay a drain or dig a ditch through the land of a private owner, for the purpose of conducting water and discharging it there. *Franklin* v. *Fisk*, 13 Allen, 211. No one under the highway act could have an assessment of damages for the probable consequences of such a trespass, for the trespass could not be anticipated, and it would not be a natural and legitimate consequence of the laying out of the street. The only right of the town to maintain the drain in Coolidge's land was obtained through its license, but Coolidge could give the town no greater rights than he had himself. He had no right as a land-

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owner to take surface water which naturally would drain in another direction, and which had been collected and brought to catch basins near his land, in a large quantity, and to carry it down into the pond in a stream, in such quantity as to make the pond overflow, and cause a nuisance to other landowners in the vicinity. The evidence tended to show a material change in the condition of the pond, by discharging water into it which ought to have gone elsewhere.

It is true that cities and towns in the construction of streets, like private owners on their own lands, may deal with surface water in a reasonable way. They may erect barriers to prevent it from coming upon the street from adjacent lands. They may turn it from the streets upon abutting lands, if they do it in such a way as to cause no unreasonable damage.

In the present case there was something more than an ordinary disposition of surface water. The jury might find that there was an unnecessary and unreasonable change in the course of surface water, to which the contour of the land was not adapted, so as to bring it down in large quantities to a place from which it could not escape, and where its presence would be likely to create a nuisance.

Judgment for the plaintiff on the verdict.

JACOB RUBINOVITCH *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. March 30, 1906. — May 17, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, BRALEY, & SHELDON, JJ.

Negligence. Street Railway. Practice, Civil, Exceptions.

A motorman operating an electric car and the driver of a vehicle not running on a track while using a public highway owe to each other a reciprocal obligation of due care.

A street railway company, although it owes to its passengers the duty of safe transportation which is imposed on a common carrier, is not required to exercise the same degree of care toward a traveller using the highway, and its duty toward such a traveller is performed if its servants exercise the care of an ordinarily prudent and careful man when called upon to act under the circumstances of the case.

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In the trial of an action against a street railway company for personal injuries from being run into by a car of the defendant while driving in a wagon across the defendant's track, the presiding judge properly may refuse to rule that as matter of law the plaintiff was not negligent in attempting to drive across the track if he judged at the time that this could be done safely because of the distance of the car from the point where he must cross, as the jury must determine the question of the plaintiff's due care or negligence on the whole evidence.

A refusal to give an instruction in the language requested is not a ground for exception if the instructions given by the judge clearly and adequately cover the point raised by the request.

BRALEY, J. This is an action of tort to recover damages for personal injuries caused by a wagon in which the plaintiff was driving coming into collision with a car of the defendant. The accident happened at the intersection of Travers Street with Portland Street, public ways in the city of Boston, when the wagon was passing across the tracks of the company in Portland Street. At the trial in the Superior Court before the late Mr. Justice Hopkins, and a jury, the plaintiff asked for the following rulings: "That the electric or trolley cars owned and operated by the defendant are dangerous machines, and the defendant, its agents or servants, are held to the highest degree of care in operating them, . . . that the cars of the defendant company being dangerous machines, it is necessary for the motorman in charge thereof to have the car under such control that it may be stopped immediately when danger of collision becomes apparent," and "that if when first seen, the car of the defendant, from the point where the plaintiff's team would cross the defendant's track, was at such a distance (making such allowance as a man of ordinary care and prudence would allow for the decrease of speed of the car after his intention became apparent to the motorman) to enable the plaintiff to cross the track in safety, then the plaintiff would be in the exercise of due care, if, under these circumstances, he should attempt to cross." The judge declined to give these rulings, and submitted the case to the jury under instructions on the questions thus raised to which no exception was taken, and a verdict for the defendant having been rendered the case is here on the plaintiff's exceptions * to the refusals to rule as requested.

* After the death of *Hopkins*, J. the exceptions were allowed by *Richardson*, J.

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While a common carrier of passengers is held to the highest degree of care commensurate with his undertaking, this principle is applicable only to his conduct toward those who are being transported, or to whom he sustains this relation. *Warren* v. *Fitchburg Railroad*, 8 Allen, 227. The defendant, who was lawfully using the street for the operation of its railway, did not owe this duty to the plaintiff, who was a traveller upon a public way, although each owed to the other, while concurrently using the street, the reciprocal obligation of due care. *O'Brien* v. *Blue Hill Street Railway*, 186 Mass. 446. *Halloran* v. *Worcester Consolidated Street Railway*, *ante*, 104. Consequently it has been said that a motorman in charge of a car which is passing through a street, even if the motive power is electricity, stands on the same footing in regard to his due care or negligence toward other travellers as the driver of any vehicle. *Scannell* v. *Boston Elevated Railway*, 176 Mass. 170, 173. Occasions may arise where in the performance of this duty the apparent danger of severe bodily injury or death to pedestrians, or travellers by carriage, or other vehicles may demand of him the exercise of a high degree of care, but even then the requirement in degree is only such prudence and foresight as the jury, upon the evidence, may determine to have been reasonably required under the circumstances. *Uggla* v. *West End Street Railway*, 160 Mass. 351. *O'Leary* v. *Brockton Street Railway*, 177 Mass. 187.

The imperative duty of safe transportation owed to passengers which a common carrier operating a street railway engages to perform, from the very nature of the undertaking does not extend to travellers along the route, and the instructions given accurately and fully stated the true rule, that the measure of care required of the defendant's servant was that of the ordinarily prudent and careful man, when called upon to act under the conditions disclosed by the evidence. *Robbins* v. *Springfield Street Railway*, 165 Mass. 30.

In so far as the plaintiff's last request asked for a ruling that as matter of law he was not negligent in attempting to drive across the track if he judged at the time this could be safely done because of the distance of the car from the point where he must cross, it was properly refused, as it was within the province of the jury to determine the question of his due care or negligence

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on the whole evidence, and not from any particular portion of the testimony. *Hicks* v. *New York, New Haven, & Hartford Railroad*, 164 Mass. 424, 428. *Whitman* v. *Boston Elevated Railway*, 181 Mass. 138. Besides, on this issue the instructions given,* although not in the language requested, clearly and adequately covered the point raised by the request, and were correct in law. *Graham* v. *Middleby*, 185 Mass. 349.

Exceptions overruled.

J. H. Blanchard, for the plaintiff.

E. P. Saltonstall & S. H. E. Freund, for the defendant, were not called upon.

JEREMIAH J. MANNING, administrator, *vs.* JOHN T. CONWAY.

Middlesex. March 12, 1906. — May 18, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Practice, Civil, Amendment. *Negligence.*

Under R. L. c. 173, § 48, and Rule 43, now Rule 40, of the Superior Court, that court may allow a plaintiff for whom a jury has returned a verdict on each of two counts, one under R. L. c. 171, § 2, for causing the death of the plaintiff's intestate, and the other at common law for causing conscious suffering of the plaintiff's intestate, to amend his declaration by striking out the count at common law, and whether the defendant may have been harmed by the introduction of evidence of conscious suffering is a matter to be considered by the presiding judge.

In an action under R. L. c. 171, § 1, against the proprietor of a heavy wagon drawn by two horses, for causing the death of the plaintiff's intestate, a boy about five years of age, by the alleged gross negligence of a servant of the defendant, it

* The instructions given included the following: "Now, what did he do? You have heard the evidence which he has offered. The claim on the part of the defendant is that his testimony shows that he did not look and did not discover the approach of the car until he had passed in part over the track, and when the car, as he says, was thirty, forty or fifty feet from him. His claim is that he did seasonably look and that he saw the car at a distance of forty or fifty feet, and that he judged that if the car was properly managed, he could get across. If there be a conflict in the evidence, you are to determine just what he did do. Did he seasonably avail himself of his senses so as to discover impending danger and to avoid it? If he did not, then he was not exercising due care; if he did, then he was exercising due care although an accident happened."

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appeared that the defendant's servant was driving the team at a pretty fast rate in a street twenty-two or twenty-three feet wide on the right hand side of the road two or three feet from the sidewalk, that the driver had his head partly turned toward the centre of the street and was talking with his helper who stood behind the seat, that a coal team in the middle of the road was coming toward him, and that when the teams were almost on each other, the defendant's servant gave his horses a quick jerk and turned them in toward the sidewalk to avoid the coal team, that, in so turning, the hind wheels slid in toward the sidewalk at a place where a plank had been placed in the gutter against a depression in the edgestone to make a more gradual ascent to a driveway over the sidewalk and into a yard, that the plaintiff's intestate had been playing there with another boy and was standing with his left foot on the plank and his right foot on the edgestone, that, when the wagon slid, one of the hind wheels ran up on the plank and ran over the intestate. It did not appear from the plaintiff's evidence that the driver saw the boy. *Held*, that there was no evidence to go to the jury of gross negligence of the defendant's servant, and that the presiding judge should have ordered a verdict for the defendant.

LATHROP, J. This is an action of tort in three counts. The first count is under the R. L. c. 171, § 2, for causing the death of the plaintiff's intestate, and alleges negligence on the part of the defendant personally. The second count is under the same statute and alleges gross negligence and carelessness on the part of the defendant's agents and servants. The third count is at common law for conscious suffering on the part of the plaintiff's intestate, after the injury and before his death which took place on the following day.

At the close of the evidence the judge ruled that there was no evidence to warrant a verdict on the first count, but submitted the second and third counts to the jury, who assessed damages for the plaintiff under each of these counts. The plaintiff was afterwards allowed to amend his declaration by striking out the third count. The defendant excepted to this, and contends that this should not have been allowed; and this raises the first question in the case.

We have no doubt that it was within the power of the court to allow this amendment. R. L. c. 173, § 48. Rule 43 of the Superior Court of 1900.* The case was tried before the decision of this court in *Brennan* v. *Standard Oil Co.* 187 Mass. 376, which held that a count at common law could not be joined with counts under the statute. The defendant may have been harmed by the introduction of evidence of conscious suffer-

* Rule 40 of 1906.

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ing, but this was a matter for the consideration of the judge below. *Hayward* v. *French*, 12 Gray, 453, 460. *Drew* v. *Farnsworth*, 186 Mass. 365.

The remaining question is whether there was any evidence of gross negligence on the part of an agent or servant of the defendant.

The accident occurred on Elm Street in Lowell, on May 13, 1902. The plaintiff's intestate was a boy five years and thirteen days old. He had been playing ball on the sidewalk with another boy. Near where he had been playing there was a depression in the edgestone of the sidewalk, and there was a plank or log lying in the gutter in front of and against this depression, so as to make a more gradual ascent to a driveway over the sidewalk and into a yard. There was a slight groove between the edgestone and the plank, and just before the accident the intestate was rolling a ball along this groove. He was standing on one end of the plank, with his left foot on the plank and his right foot on the edgestone. The other boy was at the other end of the plank. There were trees in the street outside the edgestone, and one of them was near where the intestate stood and between him and Central Street. The defendant's team, consisting of a heavy wagon drawn by a pair of horses, came from Central Street, at a pretty fast rate, driving on the right hand side of the road two or three feet from the sidewalk. The wagon made a good deal of noise, and could be heard some way off. The driver, who was on the seat, had his head partly turned to the left toward the centre of the street, and was talking with his helper who stood behind the seat. There was a coal team in the middle of the road coming towards the defendant's team. When the two teams were within five or ten yards of each other, or almost on each other, the heads of the horses of the defendant's team being then nearest the driveway, or the tree nearest the driveway, the defendant's driver gave his horses a quick jerk and turned them in toward the sidewalk so as to avoid the coal team. In so turning the rear wheels slid in toward the sidewalk, and one of the rear wheels ran up on the plank and ran over the intestate. Elm Street is between twenty-two and twenty-three feet wide.

The evidence given by the defendant's witnesses was to the

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effect that the boy ran out into the street against the off horse, and was thus knocked under the wheels. We assume the evidence for the plaintiff to be true.

The statute under which this action is brought had its origin in the St. of 1898, c. 565, though there were many previous statutes giving damages for death. These statutes are commented on and fully considered in *Hudson* v. *Lynn & Boston Railroad*, 185 Mass. 510.

To entitle the plaintiff to recover under the R. L. c. 171, § 2, the plaintiff must show that there was no contributory negligence on the part of the intestate, or on the part of those who had charge of him. This question is not free from doubt, inasmuch as the boy was playing where his father, who had charge of him, could not see him, but we assume that there was some evidence on this question for the jury.

The plaintiff must also show that there was gross negligence on the part of the driver of the wagon.

It was said in *Brennan* v. *Standard Oil Co.* 187 Mass. 376, 378, a case under the St. of 1898, c. 565: "Gross negligence is a materially greater degree of negligence than the mere lack of ordinary care. The statute compels us to recognize this distinction in the trial of cases like that now before us." We find nothing in the evidence in this case which would warrant the jury in finding that there was gross negligence on the part of the driver. It is contended that the driver was going at too fast a rate of speed, but the only evidence is that he was going at a pretty fast pace. It cannot be contended that he was obliged to walk his horses in that street. There was no evidence that his horses were going at a gallop, while there is evidence that they were trotting. We see nothing in this to show gross negligence. Then it is said that he should not have kept his eyes on the middle of the street, but the only danger he had to anticipate was from the approaching coal wagon which was coming in the middle of the street. The situation was a peculiar one, and when he saw that the driver of the coal wagon was not going to turn out, the only thing possible for him to do to avoid a collision was to turn his horses quickly to the right. It was a skilful act, and not one of gross negligence. The fact that the wheels skidded, and one of them struck the plank, was not to be

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anticipated. It does not appear from the plaintiff's evidence that the driver saw the boy.

Without pursuing the matter further in detail, we are of opinion that the judge should have directed the jury, as requested by the defendant, to return a verdict for the defendant.

Exceptions sustained.

W. L. Harris, for the defendant.

L. S. Cox, for the plaintiff.

JOSIAH B. CAWLEY *vs.* MACELLA GREENWOOD, executor.

Middlesex. March 19, 1906. — May 18, 1906.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Probate Court. Practice, Civil, Appeal.

Under R. L. c. 162, § 13, providing that if a person who is aggrieved by a decree of the Probate Court "omits, without default on his part, to claim or prosecute his appeal and it appears that justice requires a revision of the case," the appellate court may allow an appeal to be entered and prosecuted, if the sole heir and next of kin of a person whose will has been allowed by a decree of the Probate Court after he received notice of the petition for the allowance of the will and until it was admitted to probate and for thirty days thereafter had sufficient intelligence and ability to have contested the allowance of the will or to have taken an appeal from the decree if he desired to do so, but, although requested to do so by his son, did not wish or intend to take any action in the matter, and took no action, he cannot be said to be "without default" within the meaning of the statute, and if he dies five months after the making of the decree his son, who has only the rights of his father, cannot maintain a petition under the statute for the entry of an appeal from the decree.

On a petition under R. L. c. 162, § 13, for leave to enter an appeal from a decree of the Probate Court after the expiration of the time allowed for such entry, a finding of a single justice that the equities between the parties are such that he ought not to disturb the decree is a finding that justice does not require a revision of the case within the meaning of the statute.

PETITION, filed November 24, 1903, under R. L. c. 162, § 13, for leave to enter an appeal from a decree of the Probate Court for the county of Middlesex made on May 19, 1903, allowing a certain instrument as the last will and testament of Lovisa P. Bachelder and appointing the respondent executor thereunder.

The case was heard by *Braley*, J., who at the request of the

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petitioner appointed a commissioner under Chancery Rule 35 to take the evidence, and made a decree dismissing the petition. The petitioner appealed. The material facts found by the justice are stated in the opinion.

J. F. Manning & H. P. Harriman, for the petitioner.

J. J. Harvey, (*J. J. Pickman* with him,) for the respondent.

SHELDON, J. Lovisa P. Bachelder, a widow, died on the seventh day of March, 1903. She had executed a will on February 4, 1892, and a codicil thereto on June 23, 1899. She left as her sole heir and next of kin a brother, Charles Cawley. The respondent, who was nominated as the executor of her will and codicil, presented them to the Probate Court for the County of Middlesex, of which she had been a resident; proper citation was issued thereon, and was duly served, returnable on March 24, 1903. Personal service of this citation was made on Charles Cawley. He did not appear to oppose the probate of the will and codicil; but Josiah B. Cawley, the petitioner, a son of Charles Cawley, employed counsel to contest it, and they wrote a letter to Charles Cawley, asking leave to contest it in his behalf. He received this letter, but did not answer it, and gave no consent to making any contest. Accordingly, after many adjournments from time to time, the will and codicil were formally proved on May 19, 1903, and were allowed by the Probate Court; and letters testamentary were issued to the respondent on that day. Charles Cawley died on October 23, 1903. Josiah B. Cawley, his son, filed this petition on November 24 in the same year, under R. L. c. 162, § 13, alleging that he is a nephew of Mrs. Bachelder, that he is aggrieved by the decree of May 19, 1903, allowing her will and codicil, and has omitted to claim and prosecute an appeal therefrom within thirty days without default on his part, and that justice requires a revision of the case; and praying that he may be allowed to enter an appeal from the decree.

The petitioner was not himself an heir of Mrs. Bachelder at the time either of her decease or of the allowance of her will and codicil. His rights have accrued only since the death of his father, Charles Cawley, who was such an heir, and who died five months after the making of the decree complained of. His father had full notice of the petition for the allowance of the

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will and codicil, was informed of their contents, was invited by the counsel of his son, the present petitioner, to oppose their allowance, but did not choose to do so; and they were finally approved and allowed after successive adjournments covering a period of nearly two months. To overcome this apparent acquiescence, the petitioner offered evidence to show that his father, who was a very aged man and suffering from a long continued sickness, was not of mental capacity to understand the matter or to act intelligently thereon; but after a full hearing it was found by the justice of this court before whom the hearing was had that the elder Cawley, after he received notice of the petition for the allowance of the will and codicil and until they were admitted to probate and thirty days from the date of the decree had expired, had sufficient intelligence to have contested their allowance or to have taken an appeal from the decree, if he had so desired; that he had ability to understand the general matter, to make up his mind and to state if he desired to have the will contested, and to act in the matter; and that he did not wish or intend to act in it. After reviewing the printed report of the evidence, which was taken by a commissioner, we are fully satisfied with the finding. This is decisive of the present petition, under the doctrine of *Kent* v. *Dunham*, 14 Gray, 279. The petitioner has only the rights of his father; his father has had his day in court and his opportunity to claim an appeal, and if he were living could not now be allowed to prosecute such a petition as this; he could not be said to be without default within the meaning of R. L. c. 162, § 13.

It may be added that the single justice also found that the equities between the parties were such that he ought not to disturb the decree. This we think must be construed to be a finding that justice does not require a revision of the case. *Capen* v. *Skinner*, 139 Mass. 190. In our opinion the evidence warrants this conclusion.

The decree of the single justice denying the petition must be affirmed.

So ordered.

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MEXICAN CENTRAL RAILWAY COMPANY *vs.* COMMONWEALTH.

Suffolk. March 21, 1906. — May 18, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, BRALEY, & SHELDON, JJ.

Tax. Corporation. Statute. Railroad.

St. 1904, c. 169, relating to Massachusetts corporations authorized to construct railroads in foreign countries, did not revive the provisions of R. L. c. 14, §§ 49, 52, which were repealed by St. 1903, c. 437, § 95, and such corporations are now subject to the domestic franchise tax imposed by § 74 of the last named statute, which was corrected and re-enacted by St. 1904, c. 261, and are not subject to the former tax of one twentieth of one per cent upon the par value of the capital stock for which the domestic franchise tax was substituted.

PETITION, filed in the Supreme Judicial Court on December 6, 1905, under St. 1903, c. 437, § 84, for the abatement and repayment of a tax of $12,062.50 alleged to have been assessed erroneously on May 1, 1905.

The Commonwealth demurred and filed an answer, and afterwards waived its demurrer in open court. The case was heard by *Braley*, J. upon the bill and answer. He found and ruled that the tax assessed against the petitioner was illegal, and made a decree that the amount of the tax be repaid with interest thereon at the legal rate from June 12, 1905, to the date of entering the decree, and that the petitioner recover its taxable costs. At the request of the respondent he reported the case for determination by the full court. If the finding and ruling were right the decree was to be affirmed; otherwise, such decree was to be entered as the full court might order.

J. L. Thorndike, for the petitioner.

D. Malone, Attorney General, (*F. T. Field*, Assistant Attorney General with him,) for the Commonwealth.

SHELDON, J. This is a petition brought for the abatement and repayment of the tax assessed upon the franchise of the petitioner on the first day of May, 1905. No question is raised as to the remedy if the tax was erroneously assessed. R. L. c. 14, § 67. St. 1903, c. 437, § 84.

The petitioner is a corporation organized under the laws of Massachusetts relating to the construction of railroads in foreign

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countries. R. L. c. 111, §§ 281 *et seq.* The tax in question was one twentieth of one per cent upon the par value of its capital stock, and was assessed in accordance with the provisions of R. L. c. 14, §§ 49, 52, to which the petitioner was made subject by R. L. c. 111, § 285. No question is made but that this assessment was valid if R. L. c. 14, §§ 49, 52, were in force on the first day of May, 1905. But these sections with others were repealed in 1903, by the business corporation law, (St. 1903, c. 437, § 95,) and domestic corporations subject to the provisions of the latter statute, including the petitioner, were made liable, by § 74 of the same act, to a tax of a different amount, to be assessed in a different way. If this were all the case there is no doubt that the petitioner would be entitled to the relief which it seeks. But the St. of 1904, c. 169, in § 1 amends R. L. c. 111, § 284, by adding an enumeration of additional powers given to the corporations in question, and then provides in § 2 that "Section two hundred and eighty-five of chapter one hundred and eleven of the Revised Laws is hereby amended by adding at the end thereof the words: — except as otherwise provided herein, — so as to read as follows: — Section 285. Such corporation shall be subject to the provisions of the first clause of section forty-eight and sections fifty-five, fifty-eight, fifty-nine, sixty and seventy-eight of this chapter, and of section fifty-two of chapter fourteen, except as otherwise provided herein." The Commonwealth contends that the effect of this statute was to revive and re-enact R. L. c. 14, § 52, with so much of § 49 as was by reference in § 52 made applicable to corporations like the petitioner, and accordingly that the tax in question was rightly assessed, and that the petition cannot be maintained. *Commonwealth* v. *Kenneson*, 143 Mass. 418.

In our opinion this contention cannot be supported. The business corporation law, which by its first section was made applicable to corporations like the petitioner, not only expressly repealed the statutes, R. L. c. 14, §§ 49–52, under which such corporations previously had been taxed, but substituted a different mode of taxation with a different rule of assessment. St. 1903, c. 437, § 74. A perfecting amendment was made to the section and the section as amended was re-enacted by St. 1904, c. 261, which took effect a month after St. 1904, c. 169, relied

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on by the Commonwealth. The final expression of the legislative will accordingly is that the petitioner shall be taxed as provided in St. 1903, c. 437, § 74. Of course the Legislature could not have intended that the old mode of taxation should also remain in force; the one is a substitute for the other.

Complete effect is given to the St. of 1904, c. 169, by the construction which we adopt. R. L. c. 111, § 285, was in full force although the effect of the reference to R. L. c. 14, § 52, had been taken away by the repeal of the latter section. The amendment made by the second section of the St. of 1904 was made to § 285, as it then existed; and the only result of the amendment was to add the new words "except as otherwise provided herein," to § 285 as it then stood, without giving any other new effect to the original statute. *In re Warde*, 154 N. Y. 342, 344. It would be a forced construction of the amending statute to say that it operated a repeal of St. 1903, c. 437, § 74, even if the latter enactment were not shown by St. 1904, c. 261, to have been regarded by the Legislature as still in force after the enactment of St. 1904, c. 169.

Accordingly, the decree of the single justice must be affirmed.

So ordered.

HORACE W. BERRY *vs.* HENRY K. FRIEDMAN.

Suffolk. March 22, 1906. — May 18, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, BRALEY, & SHELDON, JJ.

Conversion. Equity Pleading and Practice, Bill. *Equity Jurisdiction,* To enable plaintiff to remove his property from defendant's premises.

If the owner of a building, after permitting a piano which has been leased to one of his tenants to be moved into the tenant's apartment by temporarily enlarging a window, at the termination of the lease of the piano requests the owner to remove it but refuses to allow this to be done in the only practicable way by again enlarging the window, this is not an assumption of dominion over the piano which amounts to a conversion.

In a bill in equity by a dealer in pianos to enjoin the owner of a building from preventing the removal from the building of a piano alleged to belong to the plaintiff, if the bill avers that the plaintiff leased the piano to a tenant of the defendant

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and that the lease became terminated and the title to the property became vested solely in the plaintiff, this is a sufficient averment of title without stating the terms of the lease or the manner in which it became terminated.

A bill in equity alleged that the plaintiff leased a piano to the tenant of an apartment in a wooden building of the defendant, that the defendant permitted a window of the apartment to be enlarged temporarily for the purpose of moving the piano in, and promised the tenant that he would give permission to remove it in the same way when necessary, that the lease became terminated and the title to the piano became vested solely in the plaintiff, that the defendant requested the plaintiff to remove the piano but refused to allow the window to be enlarged as before for that purpose, that the piano was so constructed that it could not be removed in sections without destroying it and could not be removed without making the desired opening, and that the plaintiff offered to give to the defendant a bond with sufficient sureties conditioned to make good any damages caused by the removal of the piano; praying that the defendant might be enjoined from interfering with the plaintiff in the reasonable and proper removal of his property. There was no averment in the bill that the promise of the defendant to his tenant, to allow the piano to be removed in the same way in which it was put in, was made for the benefit of the plaintiff or that it was known to him or that he acted upon it. The defendant demurred to the bill. The judge overruled the demurrer, and, it appearing that the allegations of the bill were true, and the plaintiff having filed a bond with good and sufficient sureties to make good any damage caused by the removal to the reasonable satisfaction of the defendant, the judge made a decree that the defendant be perpetually enjoined from interfering with the plaintiff in the removal of his property as set forth in the bill. *Held*, that the plaintiff, having given the defendant full security against all loss or damage and seeking to do only what the defendant originally assented to, should be permitted to make the removal in the only way in which it practically could be done, and the decree was affirmed.

BILL IN EQUITY, filed November 4, 1905, as follows:

1. The plaintiff says that he is a dealer in pianos, having a usual place of business at No. 546 Washington Street in the city of Boston.

2. That on or about July 8, 1904, he leased a piano, of the value of $265, to one Etta Bailey, then of Chelsea.

3. That, shortly thereafter, Etta Bailey hired certain apartments in the premises numbered 78 Chestnut Street in the city of Chelsea owned by the defendant; that, owing to the dimensions of the piano, Etta Bailey was unable to move it into the premises, along with her other household effects, save by enlarging a window opening into the room hired by her of the defendant; that the defendant, well knowing that fact, expressly permitted the opening to be made, and agreed, promised and assured Etta Bailey that if at any time (and which the defendant understood must, of necessity occur) it became necessary

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or desirable to remove the piano from the premises, full permission would be granted to remove the piano in a manner similar to that in which the piano was placed in the premises.

4. That on or about May of 1905 the lease under which Etta Bailey held the piano became terminated and the title to the property became vested solely in the plaintiff; that thereupon, both with and without notice from the defendant so to do, the plaintiff engaged suitable persons and apparatus to remove the piano.

5. That the defendant thereupon, although he had expressly requested its removal, refused to permit the piano to be removed from the premises, by refusing to allow any opening of any kind to be made by which the piano could be removed; that the plaintiff has repeatedly thereafter endeavored to remove the piano, and the defendant alternately requests the removal of the piano and refuses to allow the same to be removed.

6. That the premises in which the piano is located are a frame building and that it can be removed without any material damage to the premises of the defendant; that the piano is so constructed (being welded together) that it cannot be removed in sections, and any attempt to remove it otherwise than in a manner similar to that under which the same was placed in the premises would irreparably destroy and affect the value of the piano.

7. That the plaintiff has offered and now offers to execute and deliver to the defendant a bond with good and sufficient sureties and in any reasonable and proper sum, conditioned upon and for the purpose of securing the defendant against any loss or damage that he may suffer by reason of the removal of the piano in the manner aforesaid, but the defendant persistently, wilfully and maliciously refuses to permit the piano to be removed under any circumstances, although at the same time insisting upon its removal; that the plaintiff has been unnecessarily and unreasonably deprived of the use of and the rentals accruing from the piano.

Wherefore he prays that the defendant be enjoined from further interfering with the plaintiff in the reasonable and proper removal of his property as aforesaid, and for further relief.

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The defendant demurred to the bill, and assigned the following causes for demurrer:

First. That there is not stated a case for equitable relief.

Second. That on the facts stated in the bill the plaintiff has a plain and adequate remedy at law.

Third. Because the title to the piano mentioned in the bill has not been sufficiently set forth, and because the contract or lease under which the plaintiff placed the piano in the house has not been sufficiently set forth.

Fourth. Because the facts and circumstances which constitute such a breach of the alleged lease as would entitle the plaintiff to the possession of the property as against Etta Bailey, alleged to be the lessee, are not sufficiently set forth.

Fifth. Because the relief prayed for by the bill, if allowed, would leave the defendant without power to exercise his legal right to resist any forcible trespass upon his premises by the plaintiff, and would deprive him of any legal remedy against the plaintiff for any acts of trespass in the premises in attempting to remove the piano.

In the Superior Court the case was heard by *Gaskill*, J., who, it appearing that the allegations in the plaintiff's bill were true, made a final decree that the demurrer be overruled and that, the plaintiff having filed a bond to the defendant with good and sufficient sureties to make good any damage caused by the removal of the property of the plaintiff, as set forth in his bill, and to the reasonable satisfaction of the defendant, the defendant be perpetually enjoined from further interfering with the plaintiff in the removal of his property as set forth in the plaintiff's bill. The defendant appealed.

S. R. Cutler, (*H. W. James* with him,) for the defendant.

E. P. Benjamin, for the plaintiff.

SHELDON, J. The only questions argued by the defendant in this case are those which arise upon his demurrer, and apparently he did not make and now does not make any objection to a final decree being entered against him, as was done in the Superior Court, if his demurrer is not to be sustained.

The bill is somewhat inartificially drawn; but construing all its averments together it substantially states the following facts: The plaintiff is a dealer in pianos, and in July, 1904, he leased

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a piano worth $265 to one Etta Bailey. She hired an apartment in a building in Chelsea owned by the defendant. By reason of the dimensions of the piano, she was unable to move it into this apartment except by enlarging a window which opened into it. The defendant allowed this to be done, "permitted said opening to be made," and promised her to give her permission to remove the piano in the same way whenever that should be necessary. Her lease now has expired, and the plaintiff holds full title to the piano, and has endeavored to remove it; but the defendant, while insisting that the plaintiff must remove it, refuses to allow this to be done in the only practicable way, by refusing to allow any opening to be made by which it can be removed. The piano is so constructed, being welded together, that it cannot be removed in sections without destruction, or in any way other than that in which it was placed in the defendant's house. The plaintiff offers to give, and it appears that he since has given, to the defendant a bond with sufficient sureties conditioned to make good any damages caused by the removal of the piano.

The defendant's counsel contends that on these facts the plaintiff has a plain and adequate remedy at law. It is evident that the plaintiff could not obtain relief by an action of replevin; for the officer serving such a writ, while he would have no difficulty in taking possession of the piano, would not have any greater ability to remove it from the defendant's house and deliver it to the plaintiff than the plaintiff himself has. The officer could not complete the service of the writ. *Maxham* v. *Day*, 16 Gray, 213. If, however, the averments of the bill show that the defendant has converted the piano to his own use, then the plaintiff should seek his redress in an action for that conversion; for it does not appear that there is any such peculiarity in the construction of this piano that damages for its conversion would not be an adequate remedy. *Machinists' National Bank* v. *Field*, 126 Mass. 345, 349. *Schwalber* v. *Ehman*, 17 Dick. 314, 321. *Paramore* v. *Fitzgerald*, 67 Ga. 360. *Johnson* v. *Connecticut Bank*, 21 Conn. 148, 157. *Caleb* v. *Hearn*, 72 Maine, 231. *Ideal Clothing Co.* v. *Hazle*, 126 Mich. 262. *Fuller* v. *Davis' Sons*, 184 Ill. 505, 512. *Seibel* v. *Siemon*, 52 Mo. 363. *Chambers* v. *Chambers*, 98 Ala. 454.

It becomes material accordingly to determine whether the

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bill does charge a conversion of the piano by the defendant. It is evident that the plaintiff did not intend to make such a charge. He avers that the defendant requests him to move the piano; the gravamen of his complaint is not that the defendant prevents him from removing it at all, but that the defendant refuses to let him make the opening in the defendant's window which is essential for such removal. Under these circumstances, it would be putting an undue strain upon the language of the seventh paragraph of the bill to say that it charges a conversion by the defendant. Taking the averment in connection with the rest of the bill, we do not think that it appears that the defendant assumed to exercise control over the property or interfered with the plaintiff's dominion over it. *Polley* v. *Lenox Iron Works*, 2 Allen, 182. *Spooner* v. *Holmes*, 102 Mass. 503, 506. *Farnsworth* v. *Lowery*, 134 Mass. 512. *Brintnall* v. *Smith*, 166 Mass. 253, 254. The defendant has not set up any adverse title of his own, as in *Luddington* v. *Goodnow*, 168 Mass. 223, or exercised any control over the property in denial of the plaintiff's right, as in *Scollard* v. *Brooks*, 170 Mass. 445. According to the bill, he admits the plaintiff's title, and calls upon the plaintiff to take away the property. This falls far short of what appeared in *McKay* v. *Pearson*, 6 Penn. Sup. Ct. 529; *Nichols* v. *Newsom*, 2 Murphey, 302; or *Hughes* v. *Coors*, 3 Col. App. 303, relied on by the defendant. Accordingly we do not think that it can be said that the plaintiff has a plain, adequate and complete remedy at law.

There is nothing in the defendant's contentions that the plaintiff's title or the contract or lease of the piano given to Bailey, or the facts which constitute a breach of that contract or lease, are not sufficiently set forth. It is expressly averred that the lease became terminated and the title to the property became vested solely in the plaintiff. This is enough.

More difficulty seems at first sight to be presented by the defendant's contention that he ought not to be prevented from exercising his legal right to resist any forcible trespass upon his estate. But it must be remembered that the defendant consented to the piano being put into his house in the manner in which the plaintiff desires to remove it, and that the defendant then promised that it might be removed in a similar manner.

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This promise was indeed made to Bailey and not to the plaintiff; but equity sometimes will enforce for the benefit of the owner of property or the holder of a claim or demand a promise made to another. *Rice* v. *Dewey*, 13 Gray, 47. *Crowell* v. *St. Barnabas Hospital*, 12 C. E. Green, 650. *Halsey* v. *Reed*, 9 Paige, 446. *Powles* v. *Hargreaves*, 3 DeG., M. & G. 430. It may be that the plaintiff here cannot rely upon the promise to Bailey, in the absence of any averment that it was made for his benefit or known to or acted upon by him; but it remains true that according to the averments of the bill, which are admitted by the demurrer, the defendant contemplated that this piano should be removed, when that became necessary, in the same way in which it had been brought into his house, by enlarging the opening of his window, and expressed a willingness that this should be done. *Bacon* v. *Hooker*, 177 Mass. 335, 338. *Lambert* v. *Robinson*, 162 Mass. 34, 37. *Smith* v. *Hale*, 158 Mass. 178. *McLeod* v. *Jones*, 105 Mass. 403. *Doty* v. *Gorham*, 5 Pick. 487. We see no reason why the plaintiff, having given to the defendant full security against all loss or damage, and seeking to do only what the defendant originally assented to, should not now be permitted to make the removal in this way, being the only way in which it practically can be done.

Decree affirmed.

NANCY M. FRANCIS & others *vs.* ALFRED HAZLETT, receiver.

Bristol. March 23, 1906. — May 18, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, BRALEY, & SHELDON, JJ.

Judgment. Corporation. Equity Pleading and Practice, Cross bill.

If by the law of another State, in which a banking corporation that has become insolvent was organized, the liability of the stockholders of the corporation for its debts can be enforced in a suit brought by the receiver only after the amount of the debts has been ascertained judicially and other corporate property has been exhausted, and if a court of that State having jurisdiction both of the subject matter and the parties in a suit brought against the insolvent corporation asking for the appointment of a receiver has made a decree declaring that the assets of the corporation have all been disposed of and the proceeds paid out

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and applied by the receiver in pursuance of the order of the court, that there are adjudicated claims amounting to a large sum named, and that the corporation is wholly insolvent and has no property of any kind out of which to pay the amounts due to its creditors, and authorizing and instructing the receiver to bring suits against the several stockholders of the corporation, this decree is binding on the stockholders of the insolvent corporation in this Commonwealth who personally were not made parties to the suit in which the decree was made; and if the receiver brings actions at law in this Commonwealth against the stockholders here to enforce the decree of the other State, these stockholders cannot maintain a suit in equity to restrain the receiver from prosecuting such actions, nor can they be allowed to show that all other corporate property had not been exhausted by the receiver before the actions were brought.

The stockholders in this Commonwealth of an insolvent corporation organized under the laws of another State brought a suit in equity against the receiver of the property of that corporation appointed in the other State to restrain him from prosecuting actions at law against the plaintiffs to enforce their liability as stockholders for the debts of the corporation under a decree made by a court of the other State. The defendant filed a cross bill to enforce the liability of the plaintiffs for the debts of the corporation. *Held*, on demurrer, that the cross bill could not be maintained, as the defendant in the principal suit by bringing the actions which the plaintiffs sought to restrain had elected to proceed at law.

BILL IN EQUITY, filed on November 14, 1903, against Alfred Hazlett, the receiver of the American Bank of Beatrice, an insolvent corporation organized under the laws of the State of Nebraska, to restrain him from prosecuting certain actions at law now pending in the Superior Court against the plaintiffs to enforce their liability as stockholders under a judgment or decree of the District Court of Gage County in the State of Nebraska.

The defendant demurred to the bill. There was a hearing before *Morton*, J., who made a decree overruling the demurrer upon a single ground. The defendant appealed. The plaintiffs also appealed.

The defendant, not waiving his demurrer or appeal, filed an answer, and also, after leave obtained *ex parte* from a single justice, filed a cross bill seeking to enforce against the plaintiffs in the principal bill the payment of assessments as stockholders of the insolvent corporation. To the cross bill the plaintiffs filed a motion to dismiss as well as a demurrer. There was a hearing upon the motion to dismiss and the demurrer to the cross bill before *Lathrop*, J., who made a decree dismissing the cross bill. From this decree the defendant appealed.

The plaintiffs filed interrogatories addressed to the defendant, which he refused to answer, and the plaintiffs filed a motion that

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he be required to answer the interrogatories. There was a hearing before *Hammond*, J., who made a decree ordering the defendant to make answer, from which the defendant appealed.

A replication having been filed, the case was referred to a special master. His report was filed, and exceptions to it were filed by the plaintiffs and the defendant.

The plaintiffs' exceptions to the master's report were as follows:

1. Because the master excluded evidence offered by the plaintiffs in support of the disputed allegations of the bill other than the allegation of non-exhaustion of assets.

2. Because the master ruled that the bond referred to and set out in the plaintiffs' bill was not an asset within the meaning of the statutes of Nebraska, requiring assets to be exhausted as a condition precedent to any right of action to enforce a stockholder's liability.

3. Because the master excluded evidence offered by the plaintiffs tending to show fraudulent conduct on the part of the defendant as receiver and fraudulent procurement on the part of the receiver from the District Court of Gage County of certain decrees upon which is based his right of action in the courts of Massachusetts against the stockholders, residents and citizens of Massachusetts.

The defendant's exceptions to the master's report were as follows:

1. The master should not have admitted any evidence upon the question whether, before the actions were brought by the defendant in the Superior Court, the assets of the bank had been exhausted. Upon this point the defendant contends that the decrees of the Nebraska court referred to were conclusive.

2. The questions put by the plaintiffs to the receiver Hazlett should not have been admitted; they related to the question of exhaustion of assets, which was not properly before the court.

3. The master should have found that the title to the Keator note, or the claim of the bank against Warner on account of that note, passed to George M. Johnston, Jr., at the sale under the decree of October 18, 1897, which was confirmed by the decree of April 14, 1898.

4. The master should have found that when the receiver

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applied to the Nebraska court for an order to sue stockholders he had disposed of all the assets, including this note or claim.

5. The master should at least have found that the receiver disposed of all the assets that he knew of, or reasonably ought to have known of, and that the decree obtained on that statement of facts would not be invalid because it afterward turned out that there was an unknown claim to which the receiver had title.

The case was heard by *Braley*, J. upon the exceptions to the master's report. He ordered that a decree be entered overruling the plaintiffs' exceptions to the report and the first, second and fifth exceptions of the defendant, and sustaining the third and fourth exceptions of the defendant.

He further ruled, that upon all the facts alleged in the plaintiffs' bill and admitted by the answer, with the additional facts found by the master, the bill could not be maintained, and that it should be dismissed. At the request of the parties he reported the case, together with all questions of law raised by the several orders, rulings, decrees and appeals, for determination by this court, such decree to be entered as equity and justice might require.

W. Keyes, for the plaintiffs.

H. R. Bailey, (*E. B. Church* with him,) for the defendant.

SHELDON, J. The principal question raised is whether the plaintiffs are bound by the proceedings had in the District Court of Gage County, Nebraska, on March 5, 1895, in which the defendant was appointed receiver of the American Bank of Beatrice in that county, and by the interlocutory decree entered in June, 1898, by which the court, having found that the assets of the bank had all been disposed of, and the proceeds paid out and applied by the receiver in pursuance of the order of court, that there had been adjudicated and put in judgment claims against the bank to the amount of $32,795.08 and accruing interest and costs, and that the bank was wholly insolvent and had no property of any kind out of which to make the amounts due to its creditors, authorized and instructed the receiver to bring suits against the several stockholders of the bank. The importance of this question arises from the fact that, as is agreed by both parties, under the Constitution and laws of Nebraska, by which the substantive rights of the parties are governed, the lia-

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bility of the stockholders for the payment of the debts of the bank is merely secondary, and can be enforced in suits brought by the receivers only after the amount of the debts has been judicially ascertained and other corporate property exhausted. *Farmers Loan & Trust Co.* v. *Funk*, 49 Neb. 353. *State* v. *German Savings Bank*, 50 Neb. 734. *Hastings* v. *Barnd*, 55 Neb. 93. The plaintiffs contended before the master, and offered to show, that the conditions precedent to any right of action against them had not in fact been complied with.

There is no contention that any of these plaintiffs were directly made parties to the suit in the District Court of Nebraska in which the proceedings in question were taken. If the corporation, the American Bank of Beatrice, had not been a party to that suit, undoubtedly the present plaintiffs would not have been bound by any action taken therein. This was assumed in *Clark* v. *Knowles*, 187 Mass. 35, and *Hancock National Bank* v. *Ellis*, 172 Mass. 39, 45. They would be neither party nor privy to such a suit; having no notice of its inception and no duty to make any contest in it, they would be mere strangers to it, and no rights of theirs could be affected by any findings or adjudication made therein. *Eayrs* v. *Nason*, 54 Neb. 143. But there is no dispute that the plaintiffs were stockholders in this bank; and the decrees which we are considering were made in a suit brought directly against the bank, alleging its insolvency and asking for the appointment of a receiver, and no question is made but that the bank was properly served with process and appeared, or that the court in which the suit was brought had full jurisdiction both of the subject matter of the suit and of the parties thereto. Under such circumstances, it is well settled that the stockholders of the bank are bound by the proceedings taken in the suit. *Hambleton* v. *Glenn*, 72 Md. 331. *Parker* v. *Stoughton Mill Co.* 91 Wis. 174. The decrees entered in the Nebraska court and the findings made and stated therein are conclusive in that State against both the corporation and the stockholders, and must have the like force and effect when their enforcement is sought in our courts. *Hancock National Bank* v. *Farnum*, 176 U. S. 640. The plaintiffs were bound by the provisions and laws of the State of Nebraska which entered into the contract by which they acquired their shares; they have assented to this

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obligation by receiving their stock, and have subjected their rights to that extent to the jurisdiction of the Nebraska courts, and are sufficiently represented by the corporation in proceedings before those courts. *Tompkins* v. *Blakey*, 70 N. H. 584. *Childs* v. *Cleaves*, 95 Maine, 498. *Andrews* v. *Steele City Bank*, 57 Neb. 173. *Richards* v. *People*, 81 Ill. 551.

It is not necessary, however, to multiply citations for the support of these propositions. They have been settled in this Commonwealth by the decision in *Howarth* v. *Lombard*, 175 Mass. 570. In the carefully reasoned opinion by Mr. Justice Knowlton in that case it is said: "The question arises, how far these proceedings in the court of Washington are binding on the defendant. The stockholders must be assumed to have understood the statute from the first as it has been construed by the court. They must be presumed to have agreed that on the insolvency of the corporation a receiver might be appointed by the court, and the affairs of the corporation administered, and the amount of its assets and liabilities determined, and the deficiency ascertained under the order of the court, and an assessment to meet this deficiency made ratably upon all who were then stockholders. This is the only proper way of accomplishing the object of the statute, and the statute, as construed by the local courts, means this as plainly as if every part were expressed. Under the statute the stockholders impliedly agreed that if their subscriptions were in part unpaid when they were needed for creditors, they would pay the balance to the corporation or its legal representative, and that if more was needed they would also pay their proper share, up to the amount of their subscriptions, to the trustee of this additional fund, for the benefit of creditors. The determination of the questions involved are a part of the proceedings of the court in the administration of the affairs of a local insolvent corporation. The court of Washington, acting under its general authority in such administration, is the only tribunal which has jurisdiction to determine the amounts due creditors, and to collect and apply the assets of the corporation. The undertaking of the stockholders relates directly to the payment of amounts, so to be ascertained. The ascertainment is like a common case of a judgment against a corporation which is binding on stockholders. The members of such corporations, as well as the corporations

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themselves, are within the jurisdiction of the local court so far as is necessary for the determination of the rights and liabilities of the corporation and its members among themselves. In reference to this kind of liability such decisions and orders are binding on stockholders who are not before the court otherwise than by virtue of their membership in the corporation." And see the cases cited in that opinion. Although these plaintiffs were not parties to the Nebraska suit, yet they were bound by the orders which are here in question. *Howarth* v. *Ellwanger*, 86 Fed. Rep. 54, quoted in *Howarth* v. *Lombard*, p. 580.

The cases relied upon by the plaintiffs to support their contention that they are not bound by these orders made by the Nebraska court in the suit there pending against the bank contain nothing at variance with what has been said, and need not be particularly considered. The argument of their counsel rests upon the fallacy that the court had no jurisdiction over the subject matter of these decrees unless the assets of the bank were in fact absolutely exhausted. The correct position is that the court had not the right to enter these decrees until it had found the necessary facts, including the exhaustion of the corporate assets. It had jurisdiction to determine this question; and its determination thereof is conclusive in the State of Nebraska. *Brinkworth* v. *Hazlett*, 64 Neb. 592. *Andrews* v. *Steele City Bank*, 57 Neb. 173. *State* v. *German Savings Bank*, 59 Neb. 292. *Stenberg* v. *State*, 48 Neb. 299, 316. *Smithson* v. *Smithson*, 37 Neb. 535. That it must be given like force and effect here under the Constitution of the United States, art. 4, § 1, is settled by the decisions already cited.

It follows from what has been stated that none of the plaintiffs' exceptions to the master's report can be sustained, and that the defendant's fourth exception at least must be sustained. It necessarily follows also that the plaintiffs' bill cannot be maintained. It is unnecessary, accordingly, to consider the defendant's demurrer to the bill; and the only question which remains to be disposed of is that which arises upon the defendant's appeal from the decree dismissing his cross bill.

It may be granted, as the defendant contends, that "a cross bill for relief is proper in cases where, in the original suit, all things in litigation touching the subject matter cannot be brought

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before the court, but the defendant, in order to obtain a complete settlement of the controversy, is entitled to some relief which the scope of the plaintiff's bill will not afford him." Morton, J. in *Richards* v. *Todd*, 127 Mass. 167. Nor is it necessary that a cross bill should show any independent right to equitable relief, if it really involves a part of the subject matter of the original bill. *North British & Mercantile Ins. Co.* v. *Lathrop*, 70 Fed. Rep. 429. *Springfield Milling Co.* v. *Barnard & Leas Manuf. Co.* 81 Fed. Rep. 261. But the subject matter of this bill is not strictly the question whether the plaintiffs are respectively liable to pay assessments upon the stock for the benefit of creditors of the corporation; it is rather whether the conditions precedent to the defendant's right to enforce his claim that they are thus liable have been performed. Moreover, it appears that some time before the filing of the bill the defendant had brought actions at law against the respective plaintiffs for the recovery of the amounts for which he claims that they are severally liable; and it is only a several liability against each one of them that he seeks to enforce. In our opinion, he has no legal right in such a case to enforce his claims by a cross bill, but should be left to the remedy at law to which he first elected to resort.

The result is that each of the decrees appealed from must be affirmed, and that the plaintiffs' bill must be dismissed; and it is

So ordered.

FREDERICK P. STEARNS, trustee, *vs.* ADDIE C. STEARNS & others.

Middlesex. March 26, 1906. — May 18, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, BRALEY, & SHELDON, JJ.

Devise and Legacy.

A testatrix devised and bequeathed one third of the residue of her estate to a niece "and the remaining two third parts to S. . . . in trust and confidence, nevertheless, that he the said S. shall keep the said two thirds invested and from time to time, as he shall deem expedient, pay over the net income thereof to my nephew F." The nephew named owing to an illness in childhood did not go to school after reaching the age of twelve years,

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had no taste for books, and although he lived to the age of thirty-six years never engaged in business for himself. *Held*, that the gift to the nephew was merely of the income for life and that at his death the two thirds of the residue of which he had enjoyed the income, which then consisted of real estate, passed to the heirs at law of the testatrix as undevised property.

BILL IN EQUITY, filed in the Probate Court for the county of Middlesex on January 2 and amended January 3, 1906, by the trustee under the will of Martha A. Brigham, late of Framingham, for instructions as to the disposition, under the seventh clause of that will which is quoted in the first paragraph of the opinion, of two thirds of the residue of the estate of the testatrix upon the death of Fred W. Richardson, who had died after enjoying the income of the property during his life.

The case was presented upon an agreed statement of facts, which concluded as follows:

"Fred W. Richardson was born in 1869, had scarlet fever at the age of five and did not go to school after reaching the age of twelve. His mental condition was normal, but he had no taste for books nor did he ever engage in business for himself. He died, never having been married, on August 6, 1905, leaving as his heirs at law the appellants, who were his brothers and sisters.

"The two thirds of the residue which came into the hands of the trustee consisted at that time of personal property, but this was invested in real estate and now consists of a house in Framingham, valued at about $6,000, on which there is a mortgage of $2,000."

Here followed an enumeration of the heirs at law of Martha A. Brigham.

In the Probate Court *McIntire*, J. made a decree that, under the seventh clause of the will of Martha A. Brigham, Fred W. Richardson was entitled only to the income of the two thirds of the residue of the estate of the testatrix during his life; and that, he having deceased, the principal sum should be conveyed to or distributed among the heirs at law of the testatrix, as intestate property. The heirs at law of Fred W. Richardson appealed.

The case came on to be heard before *Braley*, J., who reserved it on the pleadings and agreed facts for determination by the full court, such decree to be entered as the full court might order.

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E. D. Chadwick, for Addie C. Stearns and others.

L. H. Butterworth & A. F. Butterworth, for Lucius A. Brigham and others.

R. H. Leland, for Frank H. Butterworth.

KNOWLTON, C. J. In the seventh clause of the will of Martha A. Brigham she disposed of the residue of her estate as follows: "I give, devise and bequeath one third part to my niece Miss Kate E. Richardson, and the remaining two third parts to Frederick P. Stearns of Boston, Massachusetts, in trust and confidence, nevertheless, that he the said Stearns shall keep the said two thirds invested and from time to time, as he shall deem expedient, pay over the net income thereof to my nephew Fred W. Richardson." Fred W. Richardson has deceased, and the question before us is whether he took an equitable fee which passes to his heirs, or whether his interest ended with his life.

It appears from the facts agreed that, on account of a peculiar illness in childhood, Fred W. Richardson did not go to school after reaching the age of twelve years, and had no taste for books, and although he lived to the age of thirty-six years he never engaged in business for himself. From these facts and the language of the will, the heirs of Martha A. Brigham, who claim the property as undevised estate, argue with force that this was intended as a trust which left the income inalienable, and beyond the reach of Richardson's creditors.

If we assume that the limitation of his right to receive the income to times when the trustee might deem it expedient to pay was not intended to qualify his right to have it absolutely, without unreasonable delay, we still are of opinion that he was given no more than an equitable estate for life. In its leading features the case is very similar to *Keating* v. *Smith*, 5 Cush. 232, in which it was held that the beneficiary took only the income for life. *Loomis* v. *Gorham*, 186 Mass. 444, shows a gift expressed in similar language, which was held also to be only an interest for life. In *Wynn* v. *Bartlett*, 167 Mass. 292, *Wainwright* v. *Tuckerman*, 120 Mass. 232, *Boston Safe Deposit & Trust Co.* v. *Buffum*, 186 Mass. 242, *Buffinton* v. *Maxam*, 152 Mass. 477, and *Mayhew* v. *Godfrey*, 103 Mass. 290, are decisions of a similar kind, although each case has its own peculiar facts. The

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cases in which a gift of income is held to pass an absolute estate all have some feature which does not exist in the present case. Some of them show a gift in terms direct to the beneficiary, with an additional provision creating a trust, as in *Fay* v. *Phipps*, 10 Met. 341, 343, *Holden* v. *Blaney*, 119 Mass. 421, 425, and *Hayward* v. *Rowe*, 190 Mass. 1. Some of them show a power in the trustee to use and apply the whole or any part of the principal for the beneficiary. See the two cases last cited. In *Hayward* v. *Rowe*, the gift was of money to the beneficiary, and then there was a provision for holding it in trust and paying her the income, and for using it in the purchase of real estate for her occupation, if the trustee should think such a purchase would be for her good. These cases differ materially from the case at bar.

Upon the death of the life tenant this part of the property passed to the heirs at law of the testatrix as undevised estate.

Decree of Probate Court affirmed.

MOSES A. T. HART *vs.* WILLIAM H. BRIERLEY.

Bristol. March 26, 1906. — May 18, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, BRALEY, & SHELDON, JJ.

Practice, Civil, Assessor's report, Exceptions.

If a party to an action which has been sent to an assessor wishes to raise a point of law as to the measure of damages, he must ask the assessor for a ruling and except to its refusal, so that the alleged erroneous ruling may appear in the assessor's report and thus may be reviewed by the presiding judge.

The denial by a judge of a motion to recommit an assessor's report is not the subject of exception.

TORT, against a deputy sheriff, for the alleged conversion of certain biscuits and crackers in cases and barrels attached by the defendant on September 14 and 18, 1903, in the possession of the plaintiff as the property of the Favorite Biscuit Company and alleged by the plaintiff to have been purchased by him from that company. Writ dated October 17, 1903.

At the trial in the Superior Court *Harris*, J. submitted certain questions to the jury and, after receiving their answers, ordered

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a general verdict for the plaintiff which was returned by the jury, and the defendant alleged exceptions. The case was sent to an assessor who made a report. The defendant moved to recommit the report to the assessor. This motion was denied by the judge and the defendant appealed.

In a decision reported in 189 Mass. 598, this court overruled the exceptions, and ordered that the order of the Superior Court accepting and confirming the assessor's report be affirmed.

After the handing down of the rescript the plaintiff moved for judgment in the Superior Court. On January. 31, 1906, the motion was allowed by *Fox*, J., who ordered that judgment be entered accordingly. The defendant then moved "that, after the entry of judgment in this action, execution may be stayed pending an adjudication as to the amount included in the assessor's findings, which the plaintiff cannot recover in this action, because of the finding by the jury that same were not attached by the defendant under the rule of estoppel referred to in the opinion of the Supreme Judicial Court." The motion was denied by the judge.

The defendant appealed from the order allowing the motion for judgment and from the order denying his motion for a stay of execution after judgment.

The judge under R. L. c. 156, § 19, certified that he considered that the question of law raised by the defendant's appeals from the allowance of the motion for judgment and from the denial of the motion for stay of execution was immaterial and frivolous, and ordered that the case be entered and ready for hearing at the March sitting of the court for the Commonwealth.

A. S. Phillips, for the defendant.

M. Druce, for the plaintiff.

BRALEY, J. The short answer to this appeal is, that upon the face of the printed record no error appears, as an examination of the assessor's report does not disclose the specific question of law which the defendant attempts to raise. See *Corsiglia* v. *Burnham*, 189 Mass. 347. It is indeed set forth in the motion for a stay of execution, when read in connection with the sixth special finding of the jury, but as the report states that the conversion took place on a subsequent date, it was

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encumbent on the defendant to take an exception before the assessor, who passed only on the measure of damages, so that the alleged erroneous ruling could appear in his report. If this had been done, at the proper time a motion to recommit could have been made based on the error now relied on, and which having been called to the attention of the assessor, the question being properly saved could have been reviewed by the Superior Court. It may be further said that on a motion generally to recommit, although no question of law had been saved, the judge in his discretion might order a recommital if satisfied that justice required that the assessor should more fully state the grounds on which damages had been assessed, but a refusal to exercise this discretionary power as well as to grant a stay of execution after judgment cannot be reviewed by this court. *Paddock* v. *Commercial Ins. Co.* 104 Mass. 521. *Carew* v. *Stubbs*, 161 Mass. 294. *Speirs* v. *Union Drop Forge Co.* 180 Mass. 87, 89. *Craig* v. *French*, 181 Mass. 282. *National Machine & Tool Co.* v. *Standard Shoe Machinery Co.* 186 Mass. 44.

If, however, the case is considered outside of the record, and as broadly argued, the point which the defendant seeks again to raise was explicitly presented by a report made by the presiding judge who heard and denied a motion to recommit the assessor's report based on the present, and other objections, although the report of the latter was then omitted from the record. In the former opinion, after a full presentation by counsel for the defendant, this precise question was decided adversely to his contention, and that decision must be deemed final. *Hart* v. *Brierly*, 189 Mass. 598.

After denying the motion a certificate was made directing the earliest possible entry of this appeal for argument because it was determined that it was "immaterial and frivolous," and after due consideration by us, it fully appears to be without merit.

The order denying the motion, therefore, must be affirmed, and under the provisions of R. L. c. 156, § 13, the plaintiff is to be allowed double costs, with interest at the rate of twelve per cent on the amount of the judgment from the date of appeal.

So ordered.

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STEPHEN W. REYNOLDS & others *vs.* SUPREME COUNCIL OF THE ROYAL ARCANUM.

Suffolk. March 26, 27, 1906. — May 18, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, BRALEY, & SHELDON, JJ.

Fraternal Beneficiary Corporation.

A fraternal beneficiary corporation which is subject to the provisions of R. L. c. 119 by an amendment of its by-laws may require the assessments paid by its members for death benefits to be increased when a member reaches a certain age instead of remaining at the rate determined by the age of the member when he received his certificate.

The members of a fraternal beneficiary corporation subject to the provisions of R. L. c. 119 are bound by the by-laws of the corporation regularly made or amended, even without an express agreement on the subject such as existed in this case.

By the prescribed form of application for membership of a certain fraternal beneficiary corporation which was subject to the provisions of R. L. c. 119 every member agreed to "conform to and abide by the constitution, laws, rules and usages of the said council and order now in force, or which may hereafter be adopted by the same." The benefit certificates promised payment out of the widows and orphans' benefit fund only on condition that the member "complies in the future with the laws, rules and regulations now governing the said council and fund, or that may hereafter be enacted by the supreme council to govern the said council and fund." Under the by-laws then existing the assessments of the members from which the death benefits were derived were determined by the age of each member when he received his certificate and thereafter remained unchanged during the life of the member. Finding that the payments for death benefits exceeded the receipts from the assessments, the supreme council caused mortality tables to be prepared and employed competent actuaries to devise a method, through a change of by-laws, which should enable the corporation to meet its obligations to its members. Following the recommendations of the actuaries the supreme council adopted an amendment of the by-laws by which a member after attaining the age of sixty-five years should pay assessments at the rate prescribed for an assessment at that age, giving the member an option, to pay a uniform special rate computed as the equivalent of this requirement, or to pay a step rate increasing annually from the time of receiving his certificate to and through the age of sixty-five years and then becoming constant, or to pay the constant rate which was in force before the change in the by-laws with the full amount of the benefit up to the age of sixty years, subject thereafter to an annual reduction of the amount of the benefit until the age of seventy-five years when the benefit would be reduced to one half of its original amount and thereafter would remain unchanged. *Held*, that the amendment of the by-laws was binding on the members.

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BILL IN EQUITY, filed in the Supreme Judicial Court in its amended and substituted form on March 6, 1906, and described in the opinion.

The case came on to be heard before *Braley*, J., who reserved it upon the pleadings and agreed facts for determination by the full court, such decree to be entered as justice and equity might require.

M. Storey & J. P. Leahy, for the plaintiffs.

A. E. Pillsbury, (*J. H. Butler & C. H. Waterman* with him,) for the defendant.

KNOWLTON, C. J. This is a bill in equity to set aside certain changes in the defendant's by-laws which affect the rights of certificate holders. The defendant is a fraternal beneficiary association, organized under the laws of Massachusetts in 1877, and now subject to the provisions of R. L. c. 119, and the acts in amendment thereof. The plaintiffs are certificate holders, who bring this bill for themselves and in behalf of others. From the time of its organization the defendant issued certificates to members, agreeing to pay to a designated beneficiary a sum not exceeding a certain number of dollars on the death of the member, upon compliance by him with certain conditions therein stated. The by-laws provided that the death benefit should be for a definite amount, and payments of these definite amounts have always been made. The words "not exceeding" are inserted in the certificate to meet the possibility of a single full assessment not being equal to the amount stated. This limitation of the payment to the amount of an assessment, except when there is an emergency fund, was expressly called for by St. 1899, c. 442, § 11, which is now found in R. L. c. 119, § 6. Until 1898 the assessments paid by members, from which the death benefits were derived, were certain sums dependent upon the age of the member at the time of receiving his certificate, which sums remained the same as the years went by. These sums were paid to meet assessments as members died, and the amount for the first year would equal the cost to the corporation of the insurance of these members. But as the members grew older the risk of their death increased, and as their payments remained constant, and as there was at no time a payment of any surplus beyond the amount required to meet losses, the pay-

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ments by members of long standing were not nearly enough to equal the cost of their insurance to the corporation. So the only way in which the amounts required to meet losses could be obtained was from the payments made by new members.

In 1898 the by-laws were amended so as largely to increase the payments to be made by all members, and to require the payments monthly. These amendments went into effect on August 1, 1898, and it appears by the agreed facts that no objection thereto has ever been made by any member of the order. These payments, while much larger than those required by the original by-laws, were upon the same relative basis; that is, the increase upon all was in the same proportion, and they were all determined by the age of the member when he received his certificate, and were not to be afterwards changed as a member grew older.

When these amendments were made it was thought that the increase would provide for the future payments called for by the certificates, and that an adequate emergency fund would be created from this income. Under these amendments there was a surplus in 1898 from the excess of receipts above payments amounting to more than $455,000, and afterwards there was annually a steadily diminishing surplus from the same cause to and including the year 1903. In the year 1904 the payments exceeded the receipts, and there was a deficit of $271,540.50.

Before the session of the Supreme Council in May, 1905, the executive committee caused mortality tables of the order to be prepared, and made extended investigations and studies with the aid of competent actuaries, to devise some method, through a change of by-laws, which should enable the corporation to meet its obligations to members. The actuaries prepared for them new tables, each the mathematical equivalent of the others, the first being the regular rates and three others optional alternatives. These were founded upon the payment by the order of the maximum value of each certificate, and the payment by the members of a rate adequate, without further modification or additional assessment, to pay the certificates at the maturity thereof. It is agreed that "competent actuaries would testify, and the case may be taken as though they had testified, that the old plan

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of assessments was faulty, according to the assumptions made by actuaries, and that the order could not meet the maximum face of its certificates permanently under it; that upon their assumptions a change was expedient, or necessary; that the plans proposed and adopted were mathematically correct; that if the members paid the amounts fixed in these tables the order could continue to pay the maximum face value of its certificates at their maturity; that such amounts are no higher than necessary for this purpose, and that they fairly and equitably apportion among the members their contributions to the widows and orphans' benefit fund, taking into consideration their age and risk." "The plaintiffs do not controvert this evidence in this case, but reserve the right to discuss its materiality, the basis and theories upon which it rests, and its application to this case." On January 1, 1905, the members of the corporation were 305,083 in number, and they held benefit certificates amounting to $680,848,000.

Under these conditions the changes recommended by the actuaries were adopted by an amendment of the by-laws by an almost unanimous vote of the members of the Supreme Council, and the question is whether the changes are legal and binding upon the members.

From the facts agreed it is plain that a great corporation, managing and controlling important financial interests for hundreds of thousands of families, was conducting its business upon unsound principles, which, if followed without change, would ultimately lead to financial ruin. The first question is, was the change adopted in excess of the defendant's corporate powers, or in violation of the statute governing such corporations. The statutes authorize the adoption of by-laws declaring "the manner in which . . . the purposes of its incorporation may be accomplished." R. L. c. 125, § 6; c. 119, § 2. These by-laws may prescribe the "assessments and benefits in case of disability or death, and the conditions upon which the same shall be paid . . . , the method of the amendment of the by-laws and such other provisions as the corporation may determine." R. L. c. 119, § 2. Such a corporation "may make provision for the payment of benefits in case of death or disability or of both. The funds from which the payment of such benefits shall be made shall be

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derived only from assessments collected from the members. . . . Such provisions, funds, assessments and payments shall be as required in the by-laws of the corporation." R. L. c. 119, § 6.

Plainly the statute contemplates that such corporations shall have power to establish by their by-laws a system of giving death benefits which shall be sound and equitable, and founded on principles which can reasonably be expected to furnish proper security for the performance of their contracts with members. The power to make proper changes in these particulars by amendment of the by-laws from time to time is expressly given.

There is no ground for the contention that it is a violation of the statute or of the defendant's chartered rights to provide for such assessments as will be likely to insure the payment of the sums named in the certificates. The statute expressly authorizes, not only a death fund amounting to three full assessments upon the members, but also the accumulation of an emergency fund amounting to five per cent upon the face value of all outstanding benefit certificates. The emergency fund is to be invested in safe securities, and all of these are to be deposited with the treasurer of the Commonwealth. R. L. c. 119, § 7. As the promise to pay the beneficiary is binding upon the corporation, it ought to make adequate provision to obtain the means of payment. *Newhall* v. *American Legion of Honor*, 181 Mass. 111.

The objection that the amendments are illegal by reason of the division of the members into classes cannot prevail.* There

* The result of the amendments is as follows: By the regular rates a member pays the same amount upon each assessment until attaining the age of sixty-five years, and thereafter pays the amount upon each assessment prescribed and fixed by the table of rates for the assessment at the age of sixty-five years. By selecting option A. he can pay a uniform special rate for the whole period computed as the equivalent of the regular rates. By selecting option B. he can pay a step rate which increases annually to and through the age of sixty-five years, when it becomes constant. By selecting option C. he can pay the constant rate in force before July 1, 1905, with the full amount of the benefit up to the age of sixty years, when the benefit named in the certificate will decrease annually three and one third per cent thereof until he attains the age of seventy-five years, when the benefit will have been reduced in amount to one half thereof, and will continue thereafter at that amount, the assessment rate remaining unchanged throughout.

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is no objection to a classification of members according to age, and it would be unjust to disregard age in determining the rates that different persons shall pay for death benefits in an association of this kind.

The distinctive features of such organizations remain since the adoption of the amendments as well as before. The fraternal plan, with mutuality and without profit, distinguishes the work of such an association from a commercial enterprise. It is a charitable and benevolent organization, with a limitation of membership to a special class, and a limitation upon the choice of beneficiaries. It is not allowed to employ paid agents in soliciting or procuring business, except within very narrow limits prescribed by the statutes. R. L. c. 119, § 16. Looking to the nature and purposes of fraternal beneficiary corporations, we see nothing in the amendments at variance with the law. It cannot have been intended that such corporations should be limited to a method of assessment that would be sure to bring about their early dissolution.

Another question is whether the amendments are in violation of the contract rights of members. It is stated in the record that "the agreements between the plaintiff and the defendant concerning assessments and benefits are not contained in any one specific instrument, but are found in the application for membership, the benefit certificate, the laws of Massachusetts constituting the charter, and the constitution and laws of the order." If there were no express stipulation in regard to the by-laws in the application for membership or in the certificates, all members of such a corporation would be bound by by-laws regularly made or amended. *Durfee* v. *Old Colony & Fall River Railroad*, 5 Allen, 230, 242. *Pain* v. *Société St. Jean Baptiste*, 172 Mass. 819. *Oliver* v. *Hopkins*, 144 Mass. 175. *Spilman* v. *Home Circle*, 157 Mass. 128. *Wright* v. *Minnesota Ins. Co.* 193 U. S. 657. *Knights of Pythias* v. *Knight*, 117 Ind. 489.

Every member of this corporation, at the time of joining it, enters into an express agreement to "conform to and abide by the constitution, laws, rules and usages of the said council and order now in force, or which may hereafter be adopted by the same." *

* These words are in the prescribed form of the application for membership.

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The benefit certificates promise payment out of the widows and orphans' fund only on condition that the member "complies in the future with the laws, rules and regulations now governing the said council and fund, or that may hereafter be enacted by the supreme council to govern the said council and fund," etc. Here in the contract is full authority to amend the laws, rules and regulations.

In regard to a similar provision under which a mutual fire insurance company changed its by-laws, so as to increase the assessments upon certain policy holders, the Supreme Court of the United States uses this language: "The liability of the members of this institution is of a twofold nature. It results both from an obligation to conform to the laws of their own making, as members of the body politic, and from a particular assumption or declaration which every individual signs on becoming a member. The latter is remarkably comprehensive. 'We will abide by, observe and adhere to the constitution, rules and regulations which are already established, or may hereafter be established, by a majority of the insured . . . or which are, or may hereafter be, established by the president and directors of the society.' . . . As to what is contended to be a material alteration in their charter, we consider it merely as a new arrangement or distribution of their funds; and whether just or unjust, reasonable or unreasonable, beneficial or otherwise, to all concerned, was certainly a mere matter of speculation, proper for the consideration of the society, and which no individual is at liberty to complain of, as he is bound to consider it as his own individual act. Every member, in fact, stands in the peculiar situation of being party of both sides, insurer and insured. Certainly the general submission which they have signed will cover their liability to submit to this alteration." *Korn* v. *Mutual Assur. Soc.* 6 Cranch, 192. This part of the present case is covered in principle by the decisions of this court in *Messer* v. *Ancient Order of United Workmen*, 180 Mass. 321, and *Pain* v. *Société St. Jean Baptiste*, 172 Mass. 319, in which cases changes similar to those made by the defendant were upheld under like contracts. The same general doctrine has been stated in many cases in other courts. *Wright* v. *Minnesota Ins. Co.* 193 U. S. 657. *Fullenwider* v. *Royal League*, 73 Ill. App. 321;

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S. C. 180 Ill. 621. *Bartram* v. *Royal Arcanum*, 6 Ont. W. R. 404. *Gaines* v. *Royal Arcanum*, 140 Fed. Rep. 978. *Fugure* v. *Society St. Joseph*, 46 Vt. 362. *Knights of Pythias* v. *Knight*, 117 Ind. 489. *Haydel* v. *Mutual Reserve Fund Assoc.* 104 Fed. Rep. 718. *Gaut* v. *Mutual Reserve Fund Assoc.* 121 Fed. Rep. 403, 409. *Richmond* v. *Order of Mutual Protection*, 100 Mo. App. 8. *Barbot* v. *Mutual Reserve Fund Assoc.* 100 Ga. 681. *Mutual Reserve Fund Assoc.* v. *Taylor*, 99 Va. 208.

There are many cases in which it is held that the amount expressly promised to be paid in a certificate like those issued by the defendant cannot be cut down by an amendment of the by-laws. *Newhall* v. *American Legion of Honor*, 181 Mass. 111. *Langan* v. *American Legion of Honor*, 174 N. Y. 266. *American Legion of Honor* v. *Getz*, 112 Fed. Rep. 119. But in many of these, as in the case from this court last cited, a distinction is made between the express stipulation of the corporation to pay a certain sum and other provisions relating to the methods of the corporation, and the duties of the certificate holders, which properly may be a subject for regulation by by-laws, even though they affect the rights of the parties under their contract. The assessments to be paid for death benefits in this case are provided for by the by-laws, while the promise in writing to pay a certain sum to a particular person is, as to that person, a matter outside of those corporate rules which may be expected to be changed by an amendment of the by-laws. This promise on one side is set over against the promise of the member on the other. The promise of the member is to do what may be called for by the by-laws then existing or that may afterwards be adopted. The promise of the corporation is stated expressly, without mention of the by-laws. The member occupies a dual position, as an insurer and the insured. As one of the association agreeing to provide for the payments that may become due to members, he agrees to be subject to the by-laws. As the insured person to whom a particular sum of money is promised, he has a right to stand on the terms of the promise.

That the duties of members prescribed by the by-laws remain subject to modification when a power of amendment is reserved has often been decided. *Loeffler* v. *Modern Woodmen of*

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America, 100 Wis. 79. *Langnecker* v. *Ancient Order of United Workmen*, 111 Wis. 279. *Lawson* v. *Hewell*, 118 Cal. 613. *Gilmore* v. *Knights of Columbus*, 77 Conn. 58. *Ellerbe* v. *Faust*, 119 Mo. 653.

Most of the cases relied on by the plaintiffs, when rightly analyzed, turn on the distinction between an attempted amendment of the by-laws directly affecting the promise to the certificate holder as an insured person and an amendment affecting his duties as a member of the corporation bound to perform his part in providing means or otherwise as one of the association of insurers. *Hale* v. *Equitable Aid Union*, 168 Penn. St. 377. *Fargo* v. *Knights of Maccabees*, 96 App. Div. (N. Y.) 491. *Weber* v. *Knights of Maccabees*, 172 N. Y. 490. *Sautter* v. *Improved Order of Heptasophs*, 43 Vroom, 325. *Tebo* v. *Royal Arcanum*, 89 Minn. 3. *Deuble* v. *Ancient Order of United Workmen*, 66 App. Div. (N. Y.) 323; *S. C.* 172 N. Y. 665. *Beach* v. *Knights of Maccabees*, 177 N. Y. 100. *Starling* v. *Royal Templars*, 108 Mich. 440. *Peterson* v. *Gibson*, 191 Ill. 365. *Wist* v. *Ancient Order of United Workmen*, 22 Ore. 271. *Roberts* v. *Cohen*, 60 App. Div. (N. Y.) 259. *Roberts* v. *Ancient Order of United Workmen*, 173 N. Y. 580. *Ancient Order of United Workmen* v. *Stumpf*, 24 Tex. Civ. App. 309. *Hadley* v. *Woodmen of the World*, 1 Tenn. Ch. 413. *Spencer* v. *Ancient Order of United Workmen*, 53 App. Div. (N. Y.) 627. Other cases cited by the plaintiffs are clearly adverse to the view which we take. See *Ebert* v. *Mutual Reserve Fund Assoc.* 81 Minn. 116; *Strauss* v. *Mutual Reserve Fund Assoc.* 126 N. C. 971; *Benjamin* v. *Mutual Reserve Fund Assoc.* 146 Cal. 34.

On principle and on the weight of authority we are of opinion that there is nothing in this contract that prevents the corporation from amending its by-laws in a reasonable way, to accomplish the purposes for which it was organized, even though the change increases the payments to be made by certificate holders. Such changes necessarily involve some hardship to certain individual members, but the corporation, under the law, should do that which will bring the greatest good to the greatest number. The members who complain of its action are those who have had the benefit of insurance for themselves and their families for many years, at very much less than the cost of their insurance

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to the corporation. They have had the good fortune to survive, and therefore their contracts have brought them no money, but all the time they have had the stipulated security against the risk of death. If now they are called upon to pay for future insurance no more than its cost to the corporation they ought not to think it unjust.

Bill dismissed.

ALICE M. FITZMAURICE *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Middlesex. March 29, 1906. — May 18, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, BRALEY, & SHELDON, JJ.

Negligence. Railroad. Carrier.

If a shop girl over eighteen years of age, who is not a student, by means of false representations purchases from a railroad company a season ticket on its road issued at half price only for students under eighteen years of age, while travelling on the railroad upon this ticket she is not entitled to the rights of a passenger and is in no better position than a mere trespasser, and if while so travelling she is injured by reason of a collision, and there has been no such wanton and reckless disregard of consequences on the part of the servants of the railroad company as to make the company liable to a trespasser, she cannot maintain an action against the company for her injuries.

If a girl over eighteen years of age who is not a student travels over a railroad on a season ticket fraudulently procured by her, which is intended by the railroad company to be issued at half price only to students under eighteen years of age, she has not the rights of a passenger and her position is not improved by the fact that the conductors on the trains of the railroad company have accepted the coupons of her ticket, whether they knew of her fraud or not.

If the conductor of a train of a railroad company knows that a person in the train is travelling on a ticket procured by fraud, he has no power by accepting the ticket to give the person travelling on it the rights of a passenger.

SHELDON, J. The plaintiff, while riding upon a train of the defendant, was injured by reason of a collision; and no question is made but that she would have been entitled to a verdict in her favor if she had the rights of a passenger. She was a minor. She was riding upon a three months' season ticket which was good only for students under eighteen years of age. She had obtained this ticket by presenting to the defendant's ticket agent a certificate purporting to be signed by

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her father that she was under eighteen years of age and was a pupil in the Hollander Art School, Boston, and agreeing that she would not use the ticket otherwise than in going to and from the school; and also presenting a certificate purporting to be signed by "J. F. Miner, Principal, Hollander Art School, Boylston St., Boston, Mass.," that she was a pupil in his school, and as he fully believed intended to remain so for the next three months. She was at this time over eighteen years of age, as she testified, lived in Marlborough, and was employed in Hollander's dry goods store in Boston. The regular price for a season ticket was $32; the reduced rate for students under eighteen years of age, at which the plaintiff procured it, was $16. She had been riding upon this ticket nearly every day except Sunday for over a month, and the coupons had been received by the conductor. Upon the face of the ticket were the words, "Good only for a person under eighteen years of age." The jury having found the amount of the plaintiff's damages if she was entitled to recover, the judge ordered a verdict for the defendant, and reported the case to this court, with the stipulation that if she is entitled to recover, judgment is to be entered in her favor for that amount; otherwise, there is to be judgment on the verdict.

The defendant had the right to establish a reduced rate for students under a fixed age. R. L. c. 111, § 228. A statute requiring similar action by street railway companies was sustained by this court in a recent case. *Commonwealth* v. *Interstate Consolidated Street Railway*, 187 Mass. 436. The plaintiff knew that she did not come within the class to which this offer of a reduced rate was made, and obtained her ticket by presenting certificates of facts which she knew to be false. She thus obtained by false representations a ticket to which she knew that she was not entitled. Whatever rights she had to be regarded as a passenger on the defendant's train she had acquired solely by the fraud which she had practised upon the defendant. She had no right to profit by her fraud; she had no right to rely upon the consent of the railroad company to her entering its train as a passenger, when she had obtained that consent merely by gross misrepresentations. Accordingly she was not lawfully upon the defendant's train; she was in no better position than

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that of a mere trespasser. This principle has been affirmed in other jurisdictions. Thus it has been held that a person travelling over a railroad on a free pass or a mileage ticket which had been issued to another by name and was not transferable, was barred by his fraudulent conduct from recovering for a personal injury unless it was due to negligence so gross as to show a wilful injury. *Toledo, Wabash & Western Railway* v. *Beggs*, 85 Ill. 80. *Way* v. *Chicago, Rock Island & Pacific Railway*, 64 Iowa, 48. If the plaintiff had fraudulently evaded the payment of any fare, she certainly would not have become a passenger, and the defendant's utmost duty to her while she was upon its train would have been to abstain from doing her any wilful or reckless injury. *Condran* v. *Chicago, Milwaukee & St. Paul Railway*, 67 Fed. Rep. 522. *Toledo, Wabash & Western Railway* v. *Brooks*, 81 Ill. 245. *Chicago, Burlington & Quincy Railroad* v. *Mehlsack*, 131 Ill. 61. But such a case cannot be distinguished in principle from the case at bar, in which the plaintiff obtained her ticket at a reduced price by successfully practising a fraud. The only relation which existed between the plaintiff and the defendant was induced by her fraud; and, as was said by the court in *Way* v. *Chicago, Rock Island & Pacific Railway*, *ubi supra*, she cannot be allowed to set up that relation against the defendant as a basis of recovery. See also to the same effect *Godfrey* v. *Ohio & Mississippi Railway*, 116 Ind. 30; *McVeety* v. *St. Paul, Minneapolis & Manitoba Railway*, 45 Minn. 268; *McNeill* v. *Durham & Charlotte Railroad*, 31 Am. & Eng. Railroad Cas. (N. S.) 285.

Nor is the plaintiff helped by the fact that the defendant's conductors had accepted the coupons of her ticket. This simply showed that she had succeeded in carrying her scheme to completion. There had been a similar acceptance by the conductor in *Way* v. *Chicago, Rock Island & Pacific Railway*, and *Toledo, Wabash & Western Railway* v. *Beggs*, *ubi supra*. If the defendant's conductors did not know the real facts, their acceptance of her coupons could have no effect; if they knew the facts and acquiesced in the plaintiff's wrongful purpose, this conduct could give her no additional rights. *McVeety* v. *St. Paul, Minneapolis & Manitoba Railway*, and *Condran* v. *Chicago, Milwaukee & St. Paul Railway*, *ubi supra*.

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The cases relied on by the plaintiff do not support her contention. In *Galveston, Harrisburg & San Antonio Railway* v. *Snead*, 4 Tex. Civ. App. 31, *Ohio & Mississippi Railroad* v. *Muhling*, 30 Ill. 9, and *Austin* v. *Great Western Railway*, L. R. 2 Q. B. 442, no question of fraud was involved. The same is true of *Foulkes* v. *Metropolitan District Railway*, 4 C. P. D. 267, and 5 C. P. D. 157. In *Doran* v. *East River Ferry*, 3 Lans. 105, the plaintiff was allowed to recover on the ground that the defendant's servants had negligently failed to demand her fare, and that her injury was due to gross negligence. We have found no decision which would support a recovery under circumstances like those before us.

The plaintiff's counsel very properly has not contended that there was evidence of any such wanton or reckless conduct as to entitle her to recover in spite of her rights being only those of a trespasser. *Bjornquist* v. *Boston & Albany Railroad*, 185 Mass. 130. *Banks* v. *Braman*, 188 Mass. 367.*

According to the terms of the report there must be

Judgment on the verdict.

J. J. Shaughnessy, for the plaintiff.

J. L. Hall, for the defendant.

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* The headnotes in *Banks* v. *Braman*, 188 Mass. 367, are misleading in the use of the term "gross negligence." They have been corrected to read in future editions as follows:

"To establish liability for negligence on the part of a defendant where the plaintiff was not in the exercise of due care, the plaintiff must show intentional conduct of the defendant having a tendency to injure others which is known or ought to be known to the defendant, accompanied by a wanton and reckless disregard of its probable harmful consequences.

"Upon the issue whether the negligence of a defendant was such as to make him liable for an accident to which negligence of the plaintiff contributed, the negligence to be shown is different in kind not merely in degree from a lack of ordinary care."

See footnote 189 Mass. 273.

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EMMA M. DAHLIN *vs.* ROSE B. WALSH & another.

Middlesex. March 30, 1906. — May 18, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, BRALEY, & SHELDON, JJ.

Nuisance. Ice and Snow.

In an action against one in control of premises adjoining a sidewalk for injuries from a fall caused by an accumulation of ice on the sidewalk, there was evidence that the sidewalk was nine or ten feet wide and the defendant had shovelled off the snow to a width of six or seven feet, that there was a formation of smooth and slippery ice, thicker toward the curb and sloping toward the defendant's premises, and that the snow was higher near the street and still higher in the driveway of the street, that on the days preceding the accident there had been snow followed by rain and then by freezing weather, and that the day of the accident was clear and cold. *Held*, that the forming of the ice on which the plaintiff fell was amply accounted for by the weather conditions, and that a verdict for the defendant was ordered properly.

Whether a person in control of premises adjoining a sidewalk which is part of a highway, who has cleared off the snow from the portion of the sidewalk next to his premises leaving the outer portion uncleared, is liable for an injury to a traveller on the highway caused by his not having cleared the whole of the sidewalk adjoining his premises, *quaere*.

The owner of premises adjoining a sidewalk which is part of a highway in a city, in spite of any public duty to clear the sidewalk imposed upon him by the ordinances of the city, owes no duty to travellers on the highway to keep the sidewalk clear of ice and snow coming upon it from natural causes or to guard against accidents by scattering ashes or using any other like precaution.

TORT for personal injuries incurred at about half past eleven o'clock on the evening of March 4, 1904, while the plaintiff was walking as a traveller on the sidewalk adjoining the premises numbered 105 on Chelsea Street in that part of Boston called East Boston, from a fall caused by an accumulation of snow and ice there, against Rose B. Walsh, the owner of the building, and Morris Yudelman, a shoemaker, the tenant of the ground floor of the building, who occupied it for his business. Writ dated March 15, 1904.

At the trial in the Superior Court before *Bond*, J. there was evidence in regard to the condition of the sidewalk and the street which is described in the opinion. There also was the following evidence in regard to the weather conditions referred to on the last page of the opinion.

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One John W. Smith, weather forecaster in the employ of the United States, called as a witness by the plaintiff, testified as follows:

On March 1, three days before the accident, there was rain early in the morning; snow which began about daylight changed to rain at 7.35 A. M. and changed to moist snow again about 8.10 A. M.; and snow continued until 5 P. M. when it changed to rain again, and rained hard during the night; on that day five inches of snow fell, and the depth of snow on the ground was fifteen inches; the temperature ranged from twenty-eight to thirty-three degrees above zero.

On March 2, there was a little fall of snow from 5.15 to 5.50 A. M.; the amount of snowfall was too small to measure; the depth on the ground 14.4 inches, and the temperature ranged from twenty-six to thirty-eight degrees above zero.

On March 3, the day before the accident, it was cloudy, with rain from ten minutes before seven A. M. until forty minutes past eight o'clock P. M.; the amount of rainfall was forty-two one hundredths of an inch; the temperature ranged from twenty-four to fifty degrees above zero; the depth of snow on the ground was seven inches.

March 4, the day of the accident, was a clear, cold day; temperature, ten to twenty-four degrees above zero; depth of snow on the ground, seven inches.

At the close of the evidence, at the request of the defendant, the judge ruled that upon all the evidence the plaintiff was not entitled to a verdict against either the defendant Walsh, the owner of the house, or against the tenant Yudelman, and instructed the jury that they should return a verdict in favor of both the defendants, which was done accordingly. The plaintiff alleged exceptions to the ordering of the verdict in favor of the defendant Yudelman.

C. H. Johnson, for the plaintiff.

No counsel appeared for the defendant.

SHELDON, J. The plaintiff does not complain of the ruling of the judge at the trial that she was not entitled to recover against the defendant Walsh, but contends that there was evidence on which the jury might have found in her favor against the defendant Yudelman, who was the tenant and occupant of a

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store abutting on the sidewalk on which the plaintiff fell. Her contention is that the jury might have found that he had artificially accumulated snow on the sidewalk, which first melted and then froze from natural causes, and so created the condition of things which resulted in her fall. There was some evidence that the defendant had shovelled the snow from the sidewalk, but not for its full width; that he had left a space two or three feet wide on the side of the sidewalk towards the driveway uncleared. It also appeared that the snow was considerably higher in the driveway than on the sidewalk, sloping from the street over the gutter towards and upon the inner side of the sidewalk, and that the snow had melted and flowed towards the outer edge of the sidewalk, and then had frozen, forming a layer of slippery ice sloping from the neighborhood of the curbstone towards Yudelman's store.

It may be assumed that one might be liable for a special and peculiar injury caused by his own creation of a nuisance upon the highway, as by the artificial accumulation of ice and snow upon the sidewalk in front of his premises; and that this liability would extend to the case of one who discharged water upon the sidewalk at a time when the natural result would be to freeze the water and expose travellers upon the sidewalk to the danger of injury from falling. *Davis* v. *Rich*, 180 Mass. 235. *Leahan* v. *Cochran*, 178 Mass. 566. *Shipley* v. *Proctor*, 177 Mass. 498. If Yudelman did pile up snow upon any part of this sidewalk in such an accumulated mass as essentially to interfere with travel thereon, or by means of the operation of natural causes which he ought to have foreseen to create danger by its melting and freezing, then the plaintiff, if herself in the exercise of due care, could maintain an action against him for a personal injury caused by this conduct on his part. *Kirby* v. *Boylston Market Assoc.* 14 Gray, 249, 251. And see *McMahon* v. *Lynn & Boston Railroad*, 191 Mass. 295; *McDonald* v. *Toledo Consolidated Street Railway*, 74 Fed. Rep. 104.

The real question accordingly is whether there was any evidence that Yudelman did pile up the snow into an artificial accumulation upon any part of this sidewalk; and we cannot find that there was. The plaintiff's evidence went no further than to the effect that the sidewalk, being nine or ten feet wide, had

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been shovelled off here only to a width of six or seven feet, and that there was a formation of smooth and slippery ice, thicker toward the curb, and sloping toward the store, and that the snow was higher near the street and still higher in the driveway of the street. This formation of ice, with the snow which was upon the ground, is amply accounted for by the weather conditions, and apparently came from the snow in the street and over the gutter and perhaps also from that part of the sidewalk which had not been shovelled. The presence of this ice would not warrant the inference that it came from Yudelman's having piled up the snow which he cleared from one part of the sidewalk upon its inner edge; for under the conditions here in evidence, ice upon the sidewalk would have been as likely to form in the manner and to the extent testified to if all the surface of the sidewalk had been cleared of snow. Accordingly we need not consider whether the fact that Yudelman cleared off only a part of the sidewalk, as the jury might have found was the case, would impose upon him any duty to passers-by to clear off the whole of its surface. Certainly he owed no duty to the plaintiff to keep the sidewalk clear of ice and snow coming thereon from natural causes, or to guard against the risk of accident by scattering ashes or using any other like precautions, whether or not any public duty was imposed upon him by the ordinances of the city. *Kirby* v. *Boylston Market Assoc.* 14 Gray, 249, 252. *Moore* v. *Gadsden*, 87 N. Y. 84. *Rohling* v. *Eich*, 48 N. Y. Supp. 892.

The view of the case which we take makes it unnecessary to determine whether the jury would have had the right to find that the plaintiff was herself in the exercise of due care, a question certainly not free from difficulty.

Exceptions overruled.

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HENRY W. SHUGG, JR., *vs.* AMERICAN SHOE AND LEATHER ASSOCIATION.

Suffolk. April 2, 1906. — May 18, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, BRALEY, & SHELDON, JJ.

Contract, Performance and breach.

If one who is employed as the sole manager of a business corporation within a certain territory for a period of three years is informed orally by an agent of the corporation who has authority to discharge him that he is discharged, and later in the day he receives a letter from the defendant informing him that his services as manager terminate on the next day, he has the right to treat the discharge as occurring at the time of the conversation, and an action brought by him against the corporation for the breach of contract which is begun after the conversation and before his receipt of the letter can be found not to have been brought prematurely, especially if there is evidence warranting a finding that the letter was but a subterfuge to render the action brought of no effect.

LATHROP, J. This is an action of contract to recover damages for breach of a contract in writing, made on July 31, 1899, by the terms of which the plaintiff was to become the sole manager for the defendant in the New England States, with an office in Boston, for a period of three years from September 1, 1899, at a salary of $1,800 a year, together with twenty per cent of the net income of the business of the office and territory as a whole, over and above all expenses of the business.

In the Superior Court the case was sent to an auditor who found for the plaintiff. After the filing of his report the case was tried before a judge of the Superior Court, without a jury. He also found for the plaintiff. The only exception of the defendant is to the refusal of the judge to rule that the plaintiff could not recover because the action was brought on the morning of August 30, 1901, and the contract was not broken and the defendant was not discharged until the afternoon of that day, after the writ had issued and the keeper had been placed in possession.

We are of opinion that the judge was not bound to find the facts as stated in this request. There was evidence that the writ was not made until between twelve and one o'clock in the after-

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noon of August 30, and the keeper was placed in possession of the defendant's office shortly before two o'clock of that day. It appeared that at about nine o'clock on the morning of that day one Van Court, an officer of the defendant, had called upon the plaintiff at the defendant's Boston office and had had a conversation with the plaintiff. The plaintiff testified as follows: "I was sitting at my desk in the private office on Friday morning the 30th of August, 1901, and Mr. H. G. Van Court entered, and sat down to my right hand close to the desk and made a few remarks as near as I can recall about this: 'Mr. Shugg, I have come to do a very unpleasant thing. I have come to lay matters before you as I am ordered to by my brother. It isn't as I would have it altogether, but I must carry out my duty.' He continued by saying that they had made up their minds to come together with the National, and that of course the old association would cease to exist to-morrow, and asked me what I would like to do regarding the unexpired term of my contract. After a little backing and filling of various remarks he said Mr. Lavers thought $300 would be a mighty good settlement; I had better take that now than to be guessing at it. . . . I replied to him I had no desire to talk matters further, that if he had sprung it on me in that way I had but one thing to do, to make good my security."

The witness further testified that in the afternoon when he came back he found a letter lying on his desk stating: "You are informed that your services as manager terminate August 31, 1901." There is some confusion about the time this letter was received. The plaintiff first puts it at three o'clock, and then at half past one. The preliminary part of the bill of exceptions states that Van Court met the plaintiff after the keeper was put in; that the plaintiff and Van Court had some words, and then Van Court gave the plaintiff the letter. It further appeared that Van Court was very angry when he found that a keeper had been put in the Boston office.

No question is made as to Van Court's authority to discharge the plaintiff, and the presiding judge may well have found that both the plaintiff and Van Court understood from the conversation in the morning that the plaintiff was discharged, and that the letter was but a subterfuge to render the action brought of

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no effect. It seems to us a fair inference to be drawn from the conversation and the action of the parties. The plaintiff was informed in the morning that the defendant did not intend to carry out its contract; and it had placed itself in a position where it could not carry it out. *Blair* v. *Laflin*, 127 Mass. 518. *Paige* v. *Barrett*, 151 Mass. 67. *Drummond* v. *Crane*, 159 Mass. 577. *Cutter* v. *Gillette*, 163 Mass. 95. *Speirs* v. *Union Drop Forge Co.* 174 Mass. 175, and 180 Mass. 87, 92.

Exceptions overruled.

W. F. Kimball, for the defendant.

H. D. Campbell & C. E. Lawrence, for the plaintiff.

WILLIAM TEBBETS *vs.* CHARLES A. ROLLINS.

Suffolk. April 2, 1906. — May 18, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, BRALEY, & SHELDON, JJ.

Pledge. Receiver. Partnership.

If a bank holds the note of a partnership indorsed by one of the partners and also holds an individual note of the same partner for which that partner wrongfully has pledged to the bank property of the partnership, but the bank has no notice actual or constructive that the property pledged does not belong to the pledgor individually, and if by the terms of the pledge the security is to be applied first to the payment of the note it is given to secure, and any excess may be applied in payment of any other liability of the pledgor to the bank, upon the insolvency of the partnership and also that of the pledgor, the bank as against the receiver of the property of the partnership has a right to apply any surplus from the proceeds of a sale of the pledged property after paying the pledgor's individual note to the liability of the pledgor as indorser of the partnership note held by it, in the same way as if the property pledged had belonged individually to the partner who pledged it.

In a suit to wind up an insolvent partnership, where a receiver has been appointed and the assets of the partnership are in his hands, the holder of a secured note of the partnership should be allowed to prove his debt in full before the receiver and to participate in the distribution of the assets in the proportion to which this entitles him, without any deduction for the amount realized by him on the security, unless by permitting such proof the creditor would receive more than the face value of his debt, in which case the excess must be deducted.

BILL IN EQUITY, filed in the Superior Court on June 29, 1903, by William Tebbets against Charles A. Rollins, to wind up a partnership between the plaintiff and the defendant in the whole-

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sale grocery business theretofore carried on by them under the firm name of Henry Callender and Company.

A receiver was appointed on July 1, 1903. Later the case came on to be heard before *Richardson*, J. upon the receiver's report. Being of opinion that the questions of law arising upon a claim of the Fourth National Bank of Boston and the receiver's report relating thereto so affected the merits of the controversy that the matter ought, before further proceedings, to be determined by this court, the judge reported the case for such determination. If the ruling of the judge, as stated below, was right, a decree was to be entered as ordered; otherwise, such order was to be made as justice might require.

The following is the judge's report:

The receiver's statement concerning this claim in his report is as follows: "A claim for $2,920.89 has been presented by the Fourth National Bank of Boston on a note held by them for which they hold as collateral security a note of Wendell D. Rockwood and Joseph W. McIntyre, made to Charles A. Rollins for Henry Callender & Co. for $5,000 due March 17, 1905. If this note is paid by said Rockwood and McIntyre, nothing will be due on the claim of $2,920.89, and the balance will be available as a credit on the Fourth National Bank's claim for $6,128.23 already allowed."

It appeared at the hearing on the receiver's report that the Fourth National Bank of Boston was the holder and owner of a certain promissory note in the usual form made by Henry Callender and Company dated June 15, 1903, wherein they promised to pay $9,000 with interest to the order of the Fourth National Bank; that this note, hereinafter called the Callender note, was indorsed by Charles A. Rollins; that there was due thereon and unpaid $6,761.96 at the time of the hearing, being the amount of $6,128.23 already referred to and interest.

Charles A. Rollins made an individual promissory note dated June 24, 1903, wherein he promised to pay $4,000 to the Fourth National Bank or its order. With this individual note, which will hereinafter be called the Rollins note, Rollins deposited with the Fourth National Bank as collateral security a certain other promissory note made by Wendell D. Rockwood and Joseph W. McIntyre, dated June 17, 1903, wherein they promised to pay to

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the order of Rollins $5,000 with interest at the rate of six per cent in twenty-one months from the date thereof, which note was given by Rockwood and McIntyre in part payment for the stock of goods of Henry Callender and Company sold to them by Rollins. This note deposited as collateral security, hereinafter called the Rockwood and McIntyre note, was also indorsed by Rollins, and was paid at maturity on March 17, 1905, and, after paying from the proceeds the above named amount of $2,920.89, which was the balance of the principal and interest due upon the Rollins note, there remained a balance in the hands of the Fourth National Bank of $1,801.33.

On March 17, 1905, when the Rockwood and McIntyre note became due there was due and unpaid upon the principal and interest of the Callender note $6,761.96, reckoning interest to this last mentioned date.

The Rollins note was in the following form:

"$4000 Boston, Mass., June 24, 1903.

"On demand for value received, I promise to pay to the Fourth National Bank, of the City of Boston, or order, at said Bank, Four thousand Dollars, & interest

having deposited with said Bank, as collateral security for payment of this or any other liability or liabilities of ours to said Bank, due or to become due, or that may be hereafter contracted, the following property, viz.: Note $5000 dated June 17, 1903, pay 21 mos. from date signed.

Wendell D. Rockwood. Jos. W. McIntyre.

the market value of which is now $.....; with the right to call for additional security should the value in the judgment of the President or Cashier decline; and on failure to supply the amount demanded, this obligation shall be deemed to be due and payable on demand, with full power and authority to sell and assign and deliver the whole of said property or any part thereof, or any substitutes therefor, or any additions thereto, at any Broker's Board, or at public or private sale, at the option of said Bank, or its officers, or assigns, who shall have the right to be purchasers themselves at such Broker's Board or public sale, on the non-performance of this promise, or the non-payment of any of the liabilities above mentioned, or at any time or times there-

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after, without advertisement or any notice to the undersigned or any other person. And after deducting all legal or other costs and expenses for collection, sale and delivery, to apply the residue of the proceeds of such sale or sales, so to be made, to pay any of liabilities, due said Bank, as its President or Cashier shall deem proper, returning the overplus to the undersigned.

"Charles A. Rollins."

In the transaction between Rollins and the Fourth National Bank, in which the bank discounted the Rollins note, taking the Rockwood and McIntyre note as security, the president of the bank acted in its behalf and neither he nor the bank had knowledge or information that the $5,000 note due March 17, 1905, (the Rockwood and McIntyre note,) was made to Rollins for Henry Callender and Company, or at or before the time of such negotiation that it was given in part payment for the stock of goods of Henry Callender and Company sold to them by Rollins, and the bank and its president believed the transaction to be the personal transaction of Rollins and so treated it; that Rollins died testate on October 20, 1903, and Josephine F. Rollins was appointed executrix of his will and qualified as such; that Rollins's estate is insolvent; that subsequent to the filing of the bill and the appointment of the receiver, Tebbets, the plaintiff, died intestate, and George R. Fessenden was appointed administrator of his estate and qualified as such; that Tebbets's estate is insolvent; and that the estate of the firm of Henry Callender and Company also is insolvent.

The judge ruled that the Fourth National Bank had the right to prove its claim in full, to wit, for $6,128.23, the balance due upon the note including interest to July 1, 1903, the date of the appointment of the receiver, against the estate in the hands of the receiver, and that it was entitled to receive a dividend *pro rata* with the other creditors on the full amount of that sum, without any deduction on account of the balance of $1,801.33 remaining in its hands out of the proceeds of the Rockwood and McIntyre note after it had applied a portion of such proceeds in satisfaction of the Rollins note, and ordered that a decree be entered in accordance with this ruling, reporting the case to this court as stated above.

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D. Malone, W. S. Slocum & C. R. Darling, for the receiver.

J. R. Murphy & W. A. Buie, for the Fourth National Bank.

BRALEY, J. When the bank proved the partnership note for the balance shown by the report it held another promissory note made by Rollins, who although a member of the firm was also liable on the first note as an indorser. To secure its payment he gave as collateral security a promissory note payable to his order, but which actually he had received from the makers to whom he had sold the stock in trade belonging to the partnership as a payment in part of the price. It is stated, however, in the report that the bank took the collateral note without actual or constructive notice that it was a part of the assets of the partnership which Rollins was pledging to secure the payment of his individual debt. By the terms of the pledge the security was to be applied first in payment of the note which it was given to secure, with the right of the pledgee to appropriate any excess in payment of any other liability due from the pledgor. A sale of the pledge having occurred, and a surplus remaining after liquidating the principal demand, the question is whether the original proof made by the bank of the balance due upon the partnership note is to be reduced by deducting this surplus, or whether the proof shall stand for participation in dividends for the full amount. The case then is one where a creditor holding security from an indorser offers as against the maker proof of the entire amount due without crediting any payment made by the indorser, although it is shown that the indorser also is liable as a joint maker because a member of the partnership. The contracts of the bank gave it the right to pursue both the indorser and makers until full satisfaction of its debt was obtained, and this is not changed by the insolvency of the firm, or the right on the part of creditors to resort to the individual members for satisfaction of the firm debts. If the indorser had paid he would have been entitled to reimbursement from the partnership in full, or participation by way of a dividend if insolvency had intervened. Any security of his own that he might have pledged upon redemption would have remained his property, which his partners could not call upon him to contribute toward the payment of their joint debts, for it did not form any part of the joint assets. Upon the facts in evidence the bank having taken and held the

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pledged property without notice of any equities is in no worse position, and it is not estopped from insisting upon the full benefit of the contract which it made with the indorser.

It has been held that in proof of debts against an insolvent, or a bankrupt, secured or unsecured creditors stand alike, in that each may prove his debt in full, though the secured creditor cannot eventually receive more than the face of his debt and interest. *Merrill* v. *National Bank of Jacksonville*, 173 U. S. 131. If this decision, as argued by the receiver, originally was made by a divided court, it was unanimously followed in the subsequent case of *Aldrich* v. *Chemical National Bank*, 176 U. S. 618. The receiver also contends that the first case arose under the national banking act, and is not of general application. But the equitable principle involved is not defined or limited by the nature of the business of the insolvent, or bankrupt, and depends entirely, in the absence of a statute, upon the right of the secured creditor to obtain the full benefit of his contract, unless by so doing it is found that the equitable rights of other creditors are wrongfully impaired. The general creditors of the firm have no larger rights than their debtors, who could not have compelled contribution from the separate property of the indorser, nor do they possess any equitable right to compel his creditor, who now holds his separate property under his individual contract, to make a similar contribution. Upon this somewhat vexed question it may be that our decisions are not entirely uniform, and perhaps cannot be fully harmonized, but they have been reviewed so exhaustively in the recent case of *Hale* v. *Leatherbee*, 175 Mass. 547, which arose under Pub. Sts. c. 157, that any further consideration of the subject would be unprofitable. In that case in speaking of the rights of unsecured creditors as against the claim of secured creditors to be allowed to prove their debts in full, it was said by Mr. Justice Barker, "Their equitable right is to have their own claims proved at a just amount, and to have recognized and enforced all equities growing out of the relation of the insolvent to the demand offered for proof. Until . . . full payment . . . neither the insolvent, the assignee, nor the general creditors have an equitable right to prevent the creditor from realizing by means of his security the full payment of his debt. Where the creditor by means of his security and his proof receives his whole debt, his

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rights in the security and in the estate of the insolvent stop. If at the outset the value of the security and the value of the assets of the insolvent estate, as compared with the amount of the claims provable against it, are such as to show that the creditor will receive from both his funds more than the amount of his debt, the facts disclose an equitable right in the security on the part of the insolvent estate, which may be enforced by a restraint in the proof without doing injustice perhaps to the creditor. But when it is not shown that such a state of facts exists it is not necessary for the preservation of the equitable rights of the insolvent and his assignee and other creditors that the creditor be restrained in his proof." In accordance with this rule the bank should be permitted to participate in the distribution of the assets of the insolvent partnership without any deduction from the amount proved, unless it should appear that by permitting such proof it would receive more than the face of its debt. If this is shown then there should be a proportionate reduction.

Decree accordingly.

E. STANLEY LIBBEY & another *vs.* GEORGE C. TIDDEN & another.

T. EDWARD SHEEHAN (intervening petitioner) *vs.* SAME.

Norfolk. November 24, 1905. — May 19, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Mechanic's Lien. Contract. Seisin. Husband and Wife. Dower.

On the trial of a petition to establish a mechanic's lien, one of the respondents claimed the real estate in question under a mortgage which he contended was made and recorded before the making of the contract under which the petitioner sought to establish his lien. It appeared that three days before the purchase of the land and the making of the mortgage the prospective purchaser intending to erect a building on the land asked the petitioner, who had been furnished with the plans and specifications of the architect, for what he would do the mason work, the carpenter work and the roofing, and the plaintiff said that he would do it for $71,000, to which the prospective purchaser replied "All right, I will give you the contract," that the amounts and times of payments were not agreed upon, but it was agreed in a general way that they were to be made as the floors went on, and it also was agreed that the petitioner was to have later

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what was known as a "uniform contract," being the form of contract adopted and recommended for general use by the American Institute of Architects and the National Association of Builders, that the next day the petitioner drove some stakes to indicate where the excavation for the cellar was to be made, and after the purchase of the land had frequent interviews with the purchaser in regard to the building, that about three months later the petitioner sent two carpenters to the land to put up the batter boards and on six successive days in the next month laid the brick of cross walls in the cellar at an estimated cost of $700, that on the second day of the following month, a contract in writing was signed by the petitioner and the purchaser of the land, and "there was no particular reason why it was not signed before," that the contract was written upon the uniform contract blank, and provided that the petitioner should provide all materials and perform all the work mentioned in the specifications except cut stone and gas piping, that in addition to the terms of the oral contract dates of payment were specified, and there were provisions that the building should be finished by a certain time, that the petitioner should allow the purchaser of the land insurance money and in regard to other details. The lien sought to be established was principally for materials and labor furnished after the execution of the contract in writing. A judge, sitting without a jury, found that the instrument in writing did not in any essential particular alter the existing oral contract and was an affirmation of it and not a substitute for it, so that the materials and labor were furnished by the petitioner under a contract which was made before the making of the mortgage, and the judge ordered that the lien of the petitioner be established as against the respondent claiming under the mortgage as well as against the purchaser of the land. *Held*, that the finding of the judge as to the time when the contract was made was warranted.

Comments by HAMMOND, J. on the doctrine of instantaneous seisin as applied to dower, showing that even where the seisin of the husband was instantaneous the wife may have dower if the seisin was in the husband beneficially for his own use.

On a petition to establish a mechanic's lien, as in the case of dower, a mortgagee can take advantage of the doctrine of instantaneous seisin only where the mortgage was made to secure the purchase money or some part of it.

At the trial of a petition to establish a mechanic's lien, one of the respondents claimed under a mortgage made to a title company by the owner of the land at the time he acquired title to it, which was after he had made the contract with the petitioner under which the petitioner furnished the materials and labor for which the lien was claimed. The respondent claiming under the title company contended that the seisin of the owner of the land was instantaneous so that the petitioner's lien did not attach to the land as against the mortgage. There was evidence warranting findings, that the owner of the land wished to accomplish two things, one being to get the title to the land and the other to get a building loan to enable him to put up the building on the land for which he had made the contract with the petitioner, that the title company agreed to make the building loan but refused to lend the money to pay for the land, whereupon an individual agreed to lend the purchase money, that the following deeds were recorded simultaneously in the following order: 1, the deed to the owner, 2, his mortgage to the individual lender of the purchase money, 3, the mortgage to the title company; and that the title company did not intend to pay any of the purchase money as such, although a part of its first advance under the building loan was used to pay and discharge the mortgage given for

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the purchase money. A judge, sitting without a jury, found that the acquisition of the title to the land and the mortgage to the title company were separate transactions, and ordered that the lien of the petitioner be established as against the mortgage. *Held*, that the finding was warranted.

Where one intending to purchase certain land has made a contract for the construction of a building upon it and thereafter acquires the title to the land and makes a mortgage of it as a separate transaction for a building loan and not to secure the purchase money, the contractor for the building can establish a lien for the materials and labor furnished by him which will be good against the mortgage without showing any ratification of the contract by the owner of the land after he acquired the title to it and before he made the mortgage, no ratification being called for because the contract was his already.

Where labor and materials are furnished under a contract for the construction of a building for a person who at the time of making the contract has not the title to the land on which the building is to be built but who afterwards acquires it, the lien extends as well to the labor and materials furnished before the deed was delivered as to those furnished afterwards, and in proceedings to establish the lien it does not matter whether or not the contract was an entire one for a round price.

An architect cannot maintain a petition to establish a mechanic's lien for labor performed under an entire contract to prepare plans and specifications and supervise the erection of a building for a round sum of money, there being no lien for the work of preparing the plans and specifications.

HAMMOND, J. This is a petition to enforce a mechanic's lien upon a lot of land in Brookline, upon which an apartment hotel known as Putnam Chambers has been erected. The petition as amended alleges that the work was done under a contract between the petitioners and the respondent Tidden, by the terms of which the petitioners were to furnish all labor and materials required for the erection and completion of the building, except the foundation, cut stone, gas piping, electric wiring, heating, plumbing and painting, for the sum of $71,000; that under this contract the petitioners proceeded to furnish labor and materials actually used in the construction of the building; that without their own fault they were prevented from fully performing the contract by reason of Tidden's failure to perform his part, and that there is due to them a balance of $26,372.65, as shown in an account annexed, for which amount the lien is claimed.

An intervening petition was filed by Sheehan, alleging a contract between him and Tidden, by which Sheehan was to prepare plans and specifications and supervise the erection of the building for $2,500. The intervening petition contained allegations similar to those in the original petition as to the partial performance of the work and the prevention of its com-

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pletion, and as to the ownership of the property; and alleged that there was due as a reasonable compensation for the work done the sum of $975, for which amount a lien is claimed.

Tidden appeared, but filed no answer. The respondent Skinner filed an answer in which he denies generally the allegations of the petition, and alleges that on April 2, 1902, the date of the contract described in the amended petition, Tidden was not the owner of the premises, and did not have any right, title or interest in or to the same until April 14, 1902, on which day the owner conveyed to him and at the same time and as a part of the same transaction he mortgaged the premises to the Massachusetts Title Insurance Company for the sum of $80,000, and that both the deed and mortgage were recorded together, so that Tidden had only an instantaneous seizure of the land; that the mortgage was duly foreclosed and that Skinner purchased at the foreclosure sale, and is now the owner free from all liens which may have accrued subsequent to the mortgage. The answer further alleges that at no time before the recording of the mortgage did the petitioner make any contract with the owner, or any person having authority from him; that his labor and materials were not performed or furnished by virtue of any agreement with or by the consent of the owner or any person having authority from him before the date of the mortgage, and that no notice was given to the owner before the date of the mortgage. A similar answer to the intervening petition also was filed by Skinner.

The case was referred to an auditor. At the trial in the Superior Court the case was heard by a judge sitting without a jury, the only evidence being the report of the auditor together with nine exhibits. The judge found for the original petitioners for the amount claimed, and for Sheehan in the sum of $800; and ordered that liens be established for these respective sums. The case is before us upon certain exceptions alleged by the respondent Skinner to the findings of fact made by the judge, and to the orders establishing the liens as well as to certain rulings and refusals to rule. In considering the case the term "petitioners" will be used to designate only Libbey and Dixon, the original petitioners. Sheehan, as hereinbefore seen, is an intervening petitioner.

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1. As to the contract: One of the grounds of the defence is that the contract under which the petitioners claim was not made until after the mortgage under which Skinner held. As to this the judge found that, on April 11, 1902, a contract was made between Tidden and the petitioners Libbey and Dixon, "whereby the firm was to furnish labor and materials necessary to construct the mason work, carpenter work and roofing of" the building "for the entire price of $71,000. The amounts and times of payments were not agreed upon, but it was agreed in a general way that they were to be made as the floors went on. It was also agreed that Libbey and Dixon were to have later what is known as a 'uniform contract,' being the form of contract adopted and recommended for general use by the American Institute of Architects and the National Association of Builders. The 'uniform contract' was given on August 2, 1902, but that instrument did not in any essential particular alter the existing contract of April 11, and was an affirmation of it and not a substitute for it."

The respondent contends that the above findings are not warranted by the evidence. Inasmuch as the only evidence was the auditor's report and the exhibits, this point must be decided by an inspection of the report. Upon this question the auditor reports as follows:

"On April 2, 1902, Tidden and Libbey went to the Putnam lot and had a conversation in regard to the building which Tidden said he was intending to erect upon it, in the course of which Tidden told Libbey that he wished him to see Sheehan and then give him, Tidden, an estimate of the cost of such a building. [Another] building known as Stearns Chambers was then under construction just across the street, and Libbey and Dixon were the contractors and Sheehan was the architect. Libbey went to see Sheehan, got the plans and made figures on the cost, and on April 10 or 11 gave Tidden an estimate of $150,000. Tidden then asked him what he would do the mason work, the carpenter work and the roofing for, and Libbey said he would do it for $71,000, to which Tidden replied, 'All right, I will give you the contract.' The amounts and times of payments were not agreed upon, but it was agreed in a general way that they were to be made as the floors went on. It was

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also agreed that Libbey and Dixon were to have later what is known as a 'uniform contract,' being the form of contract adopted and recommended for general use by the American Institute of Architects and the National Association of Builders. On April 12, Libbey went to the lot and drove some stakes to indicate where the excavation for the cellar was to be made, and during the time from April 2 to that date he had frequent interviews with Tidden in regard to the building. The first item in his statement of account is a charge of $80 covering these ten days at $8 a day and including the wages of his son and another young man who went to the lot with him and helped him drive the stakes. He did nothing else in reference to the building until June 21, when he sent two carpenters there to put up the permanent batter-boards. On July 16, and on five other days in that month he laid thirty-five thousand brick in the building of cross walls in the cellar, at an estimated cost of $700, the mortar being taken from the mortar beds at the Stearns Chambers job. On August 2 the written contract was signed, and it appears in evidence as 'Exhibit 1.' Mr. Libbey said that there was no particular reason why it was not signed before, although he had spoken to Tidden frequently in regard to it. This contract is written upon the uniform contract blank, and provides that 'the contractor shall and will provide all materials and perform all the work mentioned in the specifications and shown on the drawings prepared by the said architects for the erection and completion of that portion of the work included in the specifications of building of the Putnam Chambers, except cut stone and gas piping.' This contract is claimed by the petitioners to cover all the points mentioned in the conversations between Tidden and Libbey, which resulted in Tidden's saying that he would give him the contract, except that the dates for the payments were fixed. The respondents, on the other hand, claim that the petitioners had no contract before August 2, but only an agreement for, or a promise of, one, and point out that the written contract specifies dates of payments, that the building should be finished by a certain time, that the contractors should allow the owner insurance money, etc., none of which matters were considered or spoken of by the parties when Tidden said that he would give the contract to the petitioners. At that time no agree-

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ment was made as to when the petitioners should have possession of the premises, but the written contract provided that they should have possession on or before August 5. When Tidden first spoke to Libbey about the Putnam Chambers he said he had bought the lots on which both that and Stearns Chambers were built, but Libbey said he did not know at that time who had the legal title, but he found out later that Tidden did not have it. . . . Upon the question of whether there was any contract between the parties before April 14, Tidden testified that he made no contract with the petitioners before that date, and had no definite contract with them before August 2, that he wanted them to have the job if they could meet the estimates of other people, but that he did not remember having such a conversation with Libbey on April 12, or that the latter proposed to do the mason and carpenter work and the roofing for $71,000. I find, however, that such a conversation did take place, and that Tidden did say to Libbey that he would give him the job, leaving the question of law as to whether such a contractual relation existed between the parties prior to April 14 as would support a lien for work done before and after that date, for the determination of the court."

It is urged by the respondent that even if Tidden did say to Libbey "All right, I will give you the contract," that was a simple statement of what he intended to do at some time in the future, and was not intended by him or understood by Libbey as a final acceptance of his offer; that at any rate the contract, if even then made, was too vague and indefinite to constitute a basis for a lien. His contention seems to us unsound. It is to be noted that on the very next day Libbey drove stakes to indicate where the cellar excavation was to be made, and that in June and July he did considerable work to the amount of $700, and that it does not appear that there was any agreement about this part of the work except that arising from the conversation of April 11. It is further to be noted that the form of the contract was to be the "uniform contract" well and favorably known to the trade. It is true that the times of the payments to be made as the work progressed were not definitely stated, but it was agreed generally that such payments should be made. The plans had been drawn by Sheehan, and Libbey had seen

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them and knew what was to be done. The nature and amount of the mason work, carpenter work and roofing which Libbey and Dixon were to do was known to them and to Tidden. It may be inferred that all the parties were familiar with the business, and with the form of the so-called "uniform contract." The amount of compensation also was agreed upon. In short, the precise nature of the thing to be done and of the price to be paid were fixed. The case is clearly distinguishable from cases like *Parker* v. *Anthony*, 4 Gray, 289, and *Manchester* v. *Searle*, 121 Mass. 418, cited by the respondent. The statements contained in the auditor's report, taken in connection with the inferences reasonably deducible therefrom, warranted the finding of the judge as to the time when the contract was made.

It is urged, however, by the respondent, that even if there was a contract on April 11, it was superseded by the written contract of August 2; and in support of this it is said that there are many points of difference between the oral and the written contracts. As illustrations of this difference, the respondent calls attention to the fact that the written contract provided for the erection and completion of that portion of the work included in the specifications for building the Putnam Chambers except cut stone and gas piping, whereas the oral contract was merely for the mason work, the carpenter work and roofing; that the contractors should finish the work before January 15, 1903, and that possession of the premises should be given to the contractors before August 5, 1902, the oral contract being entirely silent about these matters; and that it provides for the times and amounts of payments, also for insurance and extra work, none of which were provided for in the oral contract.

But the compensation is the same, and, notwithstanding the difference in the language as to work and labor, it does not appear that the work described in the language of the written contract is any other than, or different from, that covered by the oral contract. Notwithstanding the greater fulness of detail in the writing of August 2, we think that the auditor's report warranted a finding that in all particulars material to this question of a lien, the document was simply the reduction to writing of the oral agreement of April 11 as understood by the parties when made, and that the finding of the court that the writing

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was an affirmation of the oral contract and not a substitute for it is warranted and must stand.

2. The respondent further contends that, as against the mortgage under which he claims, the seisin of Tidden was only for an instant; and that, for that reason alone, if for no other, the lien of the petitioners, even if valid, never attached to the mortgagee's interest, but only to the equity of redemption. In other words, the respondent invokes the aid of the doctrine of instantaneous seisin. In considering this contention it is well to see what this doctrine is. The term "instantaneous seisin" is not the best that could be used to indicate the nature of the doctrine; indeed it tends to mislead. While it is true that the seisin must be only for an instant, still that is only one of the essential facts upon which the doctrine rests. Moreover, the doctrine is not always applicable where the seisin is only for an instant.

The rule as it appears in the older authorities is chiefly applied in cases where dower is sought. It is thus stated by Blackstone: "The seisin of the husband, for a transitory instant only, when the same act which gives him the estate conveys it also out of him again (as where by a fine, land is granted to a man, and he immediately renders it back by the same fine), such a seisin will not entitle the wife to dower, for the land was merely *in transitu*, and never rested in the husband; the grant and render being one continued act. But, if the land abides in him for the interval of but a single moment, it seems that the wife shall be endowed thereof." 2 Bl. Com. 132. There is much in this word "abides." A well known English writer seems to have caught its meaning when he says it means when the husband "has a seisin for an instant beneficially for his own use." Preston on Estates, tit. *Dower*, as cited in Bac. Abr. *Dower*, (C) 2, *in notis*. See also 4 Kent Com. 39; *McCauley* v. *Grimes*, 2 Gill & J. 318; *Stanwood* v. *Dunning*, 14 Maine, 290; *Gage* v. *Ward*, 25 Maine, 101. When such is the case, the wife has dower, although the seisin be but for an instant. A striking illustration of this is found in *Broughton* v. *Randall*, Cro. Eliz. 502, where father and son were seised in joint tenancy to them and to the heirs of the son, "and they were both hanged in one cart"; but because the son survived, "as appeared by some tokens, viz., his shaking his legs," his wife had dower. Another illustration is where lands descend on a

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man who is married, and a stranger enters by abatement immediately after the death of the ancestor. There the wife has dower. Bac. Abr. *Dower*, (C) 2. Doubtless the same principle would apply to a case where the husband, immediately upon receiving a deed of land and paying for it, and not acting merely as a conduit, should convey the land to a third party for a valuable consideration, or should mortgage it to secure a pre-existing debt. Even if all the papers should pass at the same time the wife would be endowed. In such a case the seisin of the husband, although but for an instant, "abides" in him within the meaning of the term as used by Blackstone, or, in other words, is in him "beneficially for his own use."

Quite frequently, however, the seisin, if only for an instant, does not so abide. The most simple case of such a seisin is "where the husband, by the same act, or by the same conveyance, by which he acquires the seisin, parts with it." Parsons, C. J. in *Holbrook* v. *Finney*, 4 Mass. 566, 568. Perhaps the most simple illustration to be found in the older books is where the husband, being a joint tenant, makes a feoffment of his part. Here the wife shall not be endowed because he was sole seised but for an instant. "By the feoffment he was seised of a several estate but for an instant, which he acquired and parted with by the feoffment." Parsons, C. J. in *Holbrook* v. *Finney*, *ubi supra*. Bac. Abr. *Dower*, (C) 2. Co. Lit. 31 b. Where also the husband acts as a mere conduit by which the title passes from his grantor to a third party, the wife is not endowed. A simple illustration of this is where a feoffment be made to B. and his heirs to the use of C. and his heirs, the wife of B. is not endowed because the same feoffment, which gave him the seisin, by the statute of uses transferred it to C., and therefore B. was but a conduit. See *Holbrook* v. *Finney*, *ubi supra*. Inasmuch as several documents may form parts of one and the same transaction, the doctrine was early extended to cases where the husband upon receiving a deed makes a mortgage back to secure the payment of the whole or a part of the purchase money, *Holbrook* v. *Finney*, *ubi supra*, and afterwards to cases where, as a part of the same transaction, the mortgage is given to a third party for a like purpose. *Clark* v. *Munroe*, 14 Mass. 351. And in this country the rule is very general that where the husband purchases land and receives a

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conveyance of the same, and at the same time executes to the vendor or to some third person who advances the purchase money, a mortgage to secure the payment of such purchase money, the widow, as against such mortgagee, is not entitled to dower. 4 Kent Com. 39. See for collection of the cases, 10 Am. & Eng. Encyc. of Law, (2d ed.) 137.

In this Commonwealth, and quite generally elsewhere, the same doctrine has been extended to the case of liens of mechanics for labor and materials. *Thaxter* v. *Williams*, 14 Pick. 49. *Perkins* v. *Davis*, 120 Mass. 408. *Ettridge* v. *Bassett*, 136 Mass. 314.

It is to be noted that whether the case be one of dower, or lien, (or of a prior judgment in States where a judgment is a lien upon real estate,) it is not sufficient to show that the seisin was only for an instant. That is not the only test. It must further appear that the mortgage, whether given to the original grantor or to a person advancing the purchase money, must be to secure the purchase money or a part thereof. Unless the transaction is in substance and effect one to secure the payment of some part of the purchase money, then the seisin, although but for an instant, is held "beneficially" to the use of the person seised, and the so called doctrine of instantaneous seisin is inapplicable. See *New Jersey Building, Loan & Investment Co.* v. *Bachelor*, 9 Dick. 600.

Under this rule was the seisin of Tidden instantaneous as against this lien? The finding of the trial judge upon this is stated in the following language: "I find that the conveyance to Tidden and his various mortgages, certainly the one under which Skinner [the respondent] claims, were separate transactions, consummated at one time, and not the component parts of one transaction, and that Tidden had not merely instantaneous but actual seisin." We are concerned with this finding only so far as it respects the Skinner mortgage. We understand it to be a finding that, certainly as to that mortgage, the seisin of Tidden was not instantaneous but, to use the language of some of the older books, it was held "beneficially" to himself.

The question whether it was instantaneous must depend upon all the facts and circumstances of the case, and, as before stated, it does not necessarily follow from the fact that the delivery of the instruments was simultaneous, that they constituted

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parts of one transaction in which the seisin was instantaneous. *Sprague* v. *Brown*, 178 Mass. 220. The evidence as before stated consisted of the auditor's report and nine exhibits. The respondent argues that the finding is wrong. Before proceeding to the examination of this question, it must be predicated that the question before this court is not whether we should have found as matter of fact upon the evidence as the trial judge found, but whether it can be said as matter of law that the finding of the judge was not warranted by the evidence.

The auditor's report gives in great detail the facts and circumstances bearing upon this question. The following may be regarded as a fair summary of them so far as material.

Some time in February, or before March 17, 1902, one Abbott, who had before acted as Tidden's agent in a similar matter, called his attention to the land in question then owned by Mary A. Putnam, and suggested to him to buy it and build upon it. Tidden said to him that if "he [Abbott] could buy the land, obtain a construction loan and sell or place enough stock in the proposed building he was to go ahead and do so, and he, Tidden, would stand behind the enterprise, and he accordingly gave Abbott full authority to act for him in all of these particulars." Early in March, Abbott, at the office of the Massachusetts Title Insurance Company, saw the respondent Skinner, then its president, and Matlack, its treasurer, and "asked for a construction loan of $80,000." He also told them that "Tidden was to take the title to the property and that he was a man of considerable means." At about this time Tidden had made an agreement in writing with Putnam to purchase this land, but neither Matlack nor Skinner had seen the agreement. At this time Tidden had also made the contract with Sheehan; and the plans which the latter had made for the proposed building were shown to Skinner and Matlack. After further interviews and investigations, Skinner and Matlack said they would accept the loan "provided it should be a first lien on the property." This was about March 17, and Abbott filled out a blank application which Skinner had given to him for that purpose, and the loan was accepted. By the terms of this contract the company was to lend $80,000 for six months, a building was to be erected thereon according to plans and specifications filed with the

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company, at an estimated cost of $140,000, and advances were to be made, as therein particularly set forth, as the building progressed. The first advance was to be $50,000, and was to be made "when the building is up to the second floor and floor is on." Nothing is said as to the way in which payment is to be made for the land, although the cost of it is stated to be $37,500. It was simply an agreement for a construction loan, and the various times fixed for the advances of money upon it were fixed solely with reference to the progress of the building.

In this state of affairs Abbott asked Matlack if the company would lend the sum of $17,500 which would be needed to provide for the purchase price, but the latter said that the company would not. Then Abbott asked Matlack if he would not lend it himself, "upon the passage of the papers," and the latter finally agreed to do so upon the condition that "the mortgage to be given to him for the loan should be a first lien upon the property, and, as he expressed it, that the operation should be simultaneous, so that the papers would be recorded in this order: First the deed to Tidden, second the Matlack mortgage, and third, the mortgage to the title company; but that all should be recorded at one and the same instant, and Abbott agreed with him that so far as his mortgage was concerned the taking of the title by Tidden and the making of the mortgage should be all one and the same transaction." It was also agreed between Abbott and Matlack "that the money was to go to the vendor and was to be treated as a part of the $80,000 loan to be paid back to him by the company out of the first payment of $50,000." Abbott also spoke of a mortgage of $22,000 held on the property by the Union Institution for Savings, which was to be assumed by Tidden, and it was agreed between himself and Matlack that the title company should assume and pay it, but that it should remain until Tidden should ask to have it paid. This mortgage was dated April 29, 1901, and was to run for three years. It was in fact paid and discharged on November 11, 1903, as a part of the $50,000 advance.

Meanwhile the title had been examined by the company and three mortgages had been prepared by the company, one to Matlack for $17,500, one to the company for $80,000, and a third to one Shawhan for $50,000. Nothing was ever advanced

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on the Shawhan mortgage, and its existence is immaterial to the case. These mortgages were all executed by Tidden, who was the mortgagor in each of them, in the forenoon of April 14, 1902. The date of the mortgage to Matlack was April 5, 1902, "which was probably the day when he agreed to lend the $17,500, and was so dated because the interest was to begin to run then." The mortgage to the company was dated March 17, 1902, "because that was the date of the acceptance of the application for the loan, and the interest was to run from that day." The deed from Putnam to Tidden was signed also in the forenoon of April 14, 1902.

These various papers were all delivered about three o'clock in the afternoon of April 14, 1902, at the registry of deeds. At that time there were present one Stevens, who was acting for the company, Abbott, who was acting for Tidden, and one Davis, who was acting for Miss Putnam. Davis handed to Stevens for examination the deed from Miss Putnam, and also two other deeds giving her title to a strip of land adjoining her own estate. The auditor describes the further proceedings as follows:

"Mr. Stevens then produced three checks — one for $4,000, another for $12,577.73, and a third for $922.27, drawn by the Massachusetts Title Insurance Company to the order of Edward Miles Abbott, and all dated April 14, which he delivered to Abbott upon Tidden's written order to that effect. These checks having been examined by Abbott and by Davis, and Stevens having found the Putnam deeds to be in proper form, and having run down the title from April 6, the date to which his previous examination had brought it, the transaction was then carried out. Abbott indorsed the check for $4,000 to the order of John G. Stearns, the grantor of Miss Putnam, and the check for $12,577.73 to the order of Mary A. Putnam, and the deeds were delivered to Mr. Stevens by Mr. Davis. Mr. Stevens then numbered the papers consecutively as follows:

"1. Deed from Stearns to Stearns; 2. Deed from Stearns to Putnam; 3. Deed from Putnam to Tidden; 4. Mortgage from Tidden to Matlack; 5. Mortgage from Tidden to Massachusetts Title Insurance Company; and 6. Mortgage from Tidden to Shawhan; and handed them to the assistant register, and instructed him to put them on record at one and the same moment,

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which was done accordingly, and they all appear to have been recorded at eight minutes after three o'clock on April 14, 1902. Mr. Stevens said that nothing was said about an instantaneous seisin, but that he told Abbott that Tidden was to have title subject to the mortgages in the order named."

The mortgage to Matlack was due in three months from its date, and was subject to the prior mortgage held by the Union Institution for Savings. The mortgage to the company was due in six months from its date, and contained covenants of warranty and against incumbrances. Subsequently it was agreed between Matlack and the company that Matlack should adopt the whole transaction; and on November 7, the $80,000 mortgage was assigned to him. Owing to delays in the construction of the building, the first advance of $50,000 was not made until November 4. It has been stated that the $22,000 due to the Union Institution for Savings and the $17,500 due on the mortgage to Matlack should be charged to this payment; and this was accordingly done. The Matlack mortgage was discharged October 9, and the discharge recorded on November 6, 1902.

These are the main features of the evidence bearing on this issue. The judge might properly have found upon the whole evidence that Tidden desired to accomplish two things, one being to get the title to the land and the other to get a construction loan, and that each transaction was separate from the other. It is certain that Miss Putnam the vendor had no interest in the manner in which Tidden obtained the money to pay for the land, and that she had nothing to do with it. The court might have found also that the company did not intend to pay any part of the purchase money as such. It had refused to advance any money for that purpose, and Matlack advanced it. It is true that when the time came for the first advance of $50,000 on the construction mortgage there were to be credited to the company as a part thereof the sums due on the Matlack mortgage and the mortgage held by the Union Institution for Savings, but these mortgages were each to be discharged, and the judge may well have found that these credits which were to be made upon this first advance were not to be regarded as payments of the purchase money as such, but rather as sums which under the covenants in the construction mortgage it was the duty of

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Tidden finally to pay. The evidence tended to show that in receiving these credits the company did not intend in any respect to be subrogated to the rights of Matlack or the savings institution, but that on the contrary it relied solely upon its rights under the construction mortgage, and this too although the company had agreed to assume and pay the mortgage held by the savings institution. Without further discussing the matter, we think that the finding of the trial judge upon this branch of the case was warranted by the evidence.

3. The respondent further contends that, even if Tidden's seisin was not instantaneous, the lien cannot attach to his interest under the mortgage. This contention is based upon the fact that, at the time the contract with the petitioners was made, Tidden was not the owner, nor was he rightfully acting for the owner. It is argued by the respondent that Tidden, after he became the owner, could not adopt or ratify any antecedent contract so as to interfere with the rights of an intervening mortgagee. The argument is well put in the respondent's brief in the following language:

"The lien law requires a contract with the owner; at the time of the deed to Tidden, and the mortgage to the insurance company, the petitioners had no contract with the owner. Tidden could, by adopting and ratifying the contract, as he subsequently did do, give to Libbey and Dixon a right to lien his interest for the amount of the entire contract; but he could not prejudice the rights of the mortgagee who took the property when it was not subject to any lien. At the moment when the deed to Tidden and the several mortgages were delivered the petitioners did not have a contract with the owner. The owner before the delivery of the deed was Mary A. Putnam. When Tidden became the owner, he, as owner, had no contract with the petitioners. He could by some act, by adoption or ratification or acquiescence in the performance of work under the contract, ratify the entire contract so that the petitioners would have a right to a lien under the entire contract as against Tidden's, the owner's, interest at the time when the contract was ratified. But it has never been held or intimated that the mere previous existence of a contract with one who subsequently became the owner, allowed the contractor to have a right to a lien

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at the moment the other party to the contract became the owner. There must be some act of the owner sufficient to cause a ratification of the contract. In the present case the owner, Tidden, did absolutely nothing, and could have done absolutely nothing, in ratification or confirmation of the petitioners' alleged contract with him between the time when Tidden became owner and when he conveyed away the several mortgage interests. At the time when the mortgage under which the respondent claims was recorded there was no existing contract with the owner of the premises. The ratification by Tidden could not, as was said before, be construed as a ratification against the previously existing rights of mortgagees."

The respondent cites *McDowell* v. *Rockwood*, 182 Mass. 150, and *Rochford* v. *Rochford*, 188 Mass. 108, as exactly in point. By an examination of the papers in the first of these cases, it appears that the mortgagee had advanced a large part of the purchase money and the mortgage was given to him in part to secure him for such advance. The case was therefore one of instantaneous seisin; and there can be no doubt that in such a case the mortgagee takes the title and succeeds to the rights of the owner. In the language of Knowlton, J. in that case, "The mortgagee takes the property as he finds it. If there is an existing lien upon it, it can be enforced, notwithstanding his mortgage. If there is a contract right, under which, as against the owner, the claimant can go on and create a lien without further action, recognition, or concession by the owner, the mortgagee takes subject to it. But the mortgagee takes the owner's legal title and succeeds to his rights. After the mortgage is made, the owner, as against the mortgagee, can do nothing to create a lien. 'The contract under which the lien is claimed' [R. L. c. 197, § 5] is not effectual to create a lien against the mortgage, if it requires, to give it efficacy, a subsequent act of acceptance or recognition." p. 154. *Rochford* v. *Rochford* was also a case of instantaneous seisin. It appears in the report that "the delivery of the deed and that of the mortgage were simultaneous and part of the same transaction." As applied to such a case the mortgagee succeeds to the rights of the original owner, and the mortgagor, the new owner, whether or not he be the person who contracted for the labor and materials, cannot

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hurt the interest of the mortgagee. The seisin is not in him "beneficially." Strictly speaking, such a case does not turn on ratification.

Courtemanche v. *Blackstone Valley Street Railway*, 170 Mass. 50, was a case however which turned upon the question of ratification. It is to be noted however that in that case the party which contracted for the labor and materials was not the owner at the time of the contract, and never became the owner. That is the reason why it was necessary to the maintenance of the lien that there should have been ratification by the defendant after it became the owner.

The true rule is that in cases of instantaneous seisin within the meaning of that term as used in this connection the mortgagee succeeds to the rights of the former owner, and where at the time of the latter's conveyance there is no lien against him there is none against the mortgage, and that is so whether the second owner undertakes to ratify or not. The rights of the mortgagee in no respect are affected by the second owner's ratification. The true cases of ratification are where the person who becomes the owner was not one of the parties to the original contract under which the lien is claimed.

The present case is not one of instantaneous seisin, nor is it like *Courtemanche* v. *Blackstone Valley Street Railway*, *ubi supra*. Tidden made the contract and was bound by it. He was none the less bound by it when he became the owner. The tie was the same all the way through. There was no instant when he was not bound by it. Why speak of the ratification of one's own contract? As in such a case the right of dower would have attached to the land free of any mortgage, so upon the same principle the right to a lien under the contract attached to it free of mortgage. Tidden was both contractor and owner the instant he became seised, and, his seisin not being instantaneous, the contract in law precedes the mortgage. And the lien extends as well to the labor and materials furnished before the deed was delivered as to those furnished afterwards. *Courtemanche* v. *Blackstone Valley Street Railway*, *ubi supra*. See also *Sprague* v. *Brown*, 178 Mass. 220; *Osborne* v. *Barnes*, 179 Mass. 597. There being a lien for whatever was due under the contract, there is no occasion to consider the law which would

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be applicable if the contract was entire for an entire price and there could be a lien only for a part.

The conclusion to which we have thus come renders it unnecessary to consider the other objections raised by the respondent, since they become immaterial. We see no error in the manner in which the judge dealt with the case. As to the petitioners the exceptions are overruled.

4. The case of Sheehan, the intervening petitioner, however, is different. He was to receive $2,500 for preparing plans and specifications and supervising the erection of the building. This was an entire contract for an entire price. There is no lien for the work of preparing the plans and specifications. *Mitchell* v. *Packard*, 168 Mass. 467. The general rule under our statute is that where there is an entire contract and there is no lien for one part there can be no lien for any part. This rule has been most frequently applied where both labor and materials were furnished under an entire contract and for want of notice to the owner no lien existed for the materials. In such cases it early was held that there was no lien for the labor. *Morrison* v. *Minot*, 5 Allen, 403. *Graves* v. *Bemis*, 8 Allen, 573. St. 1872, c. 318, § 1, (R. L. c. 197, § 2,) changed the law as to certain contracts, but it is clear that this contract is not within that statute. Nor is it within R. L. c. 197, § 16. That section plainly applies to contracts where a lien would have existed if the contract had been completed.

The agreement was made by the parties. They did not see fit to come to any agreement as to apportionment, and we cannot make a new contract for them, but must take it as made, an entire contract for an entire price; and there is no principle upon which we can apportion it. There being no lien for one part there can be no lien for the other. It follows that as to Sheehan, the intervening petitioner, the exceptions must be sustained.

Exceptions, so far as they respect the petition of Libbey and Dixon, overruled; so far as they respect the petition of Sheehan, sustained.

A. Hemenway, (*A. E. Burr* with him,) for the respondent Skinner.

F. L. Norton, for the petitioners.

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S——— *vs.* S———.

Middlesex. March 28, 1906. — May 19, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, BRALEY, & SHELDON, JJ.

Marriage and Divorce. Impotency.

Inability of a wife to perform the sexual marriage function without such severe pain as to cause a serious nervous condition and illness on her part, so that the husband and wife live apart because advised by a physician that sexual intercourse between them cannot be continued, the difficulty in their intercourse arising from a certain degree of variation from the normal in the sexual organs of both husband and wife, which would make no difficulty in intercourse between the husband and any other woman or between the wife and any other man, constitutes impotency which entitles the husband to a divorce under R. L. c. 152, § 1.

LIBEL for divorce, filed May 5, 1905, against a wife for her alleged impotency. In the Superior Court the case was heard by *Sheldon*, J., who reported it for determination by this court, as follows:

"The libellant testified that he and the libellee were married in Boston on November 24, 1897; that immediately after the marriage the libellee was unable to perform the marriage function. At the hearing it appeared that any attempt at sexual intercourse between the parties caused the respondent severe pain resulting in a serious nervous condition accompanied by severe headaches which continued usually a whole day; that at one time during attempted connection she fainted, and she invariably cried out and exclaimed with pain at each attempted connection. This condition of suffering and extreme nervousness continually increased until the mere mention of the subject became unbearable to her. Medical advice was taken, and acting upon such advice they ceased to attempt sexual intercourse for several months, but on resuming connection the same conditions arose in a more aggravated form. Upon the advice of a physician the parties separated on September 28, 1904, and have since lived apart. It also appeared that the libellee was desirous of becoming pregnant, thinking that this would result in a cure of her difficulty; that there had been a

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complete consummation of the marriage, by complete acts of sexual intercourse on more than one occasion, though each time with great distress to her. There was a certain degree in each party of variation from the normal condition and juxtaposition of the sexual organs, and the difficulty resulted from these variations taken together; there would have been no difficulty in intercourse between him and any other woman or her and any other man. Finally a physician advised them that they must absolutely separate, that sexual intercourse between them could not be continued; and they accordingly separated as aforesaid.

"Upon these facts I ruled that the libel could not be maintained, and ordered that it be dismissed; and now, at the request of the libellant, report it to the Supreme Judicial Court for its decision. If on these facts the libellant is entitled to a divorce, my order is to be vacated, and a decree *nisi* entered in his favor; otherwise the libel is to be dismissed."

H. E. Whittemore, for the libellant.

No counsel appeared for the libellee.

By the Court. On the facts stated in the report we are of opinion that the libellant is entitled to maintain his libel. *G*—— v. *G*——, L. R. 2 P. & D. 287. *H*—— v. *P*——, L. R. 3 P. & D. 126. *Payne* v. *Payne*, 46 Minn. 467. *D*—— v. *A*——, 1 Rob. Eccl. 279. 2 Bish. Mar., Div. & Sep. § 781, note 2.

According to the terms of the report the order of the Superior Court is to be vacated, and a decree *nisi* entered.

So ordered.

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JULIA F. PEAKS *vs.* MELVILLE L. COBB.

Suffolk. January 17, 1906. — May 25, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, & SHELDON, JJ.

Evidence, Best and Secondary. *Landlord and Tenant.*

A party to a lease which was executed in duplicate cannot be allowed to prove the contents of the lease by oral testimony merely on showing that his own original of the lease is lost, if he does not show that he has made any effort to procure the other original and he has not called the other party to the lease as a witness although that party is living in the city where the case is tried.

TORT, against the owner of a building numbered 102 on Huntington Avenue in Boston, by Julia F. Peaks, who hired a room from one Mrs. St. Ledger, the lessee of an apartment or suite of rooms in that building, for personal injuries from falling on a walk leading from the entrance of the building to the sidewalk of Huntington Avenue. Writ dated March 25, 1901.

At the trial in the Superior Court before *Hitchcock*, J. the defendant was allowed, against the objection and exception of the plaintiff, to testify to the language of the covenant in the lease from him to Mrs. St. Ledger which is mentioned in the opinion and under the circumstances there stated. The judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

E. R. Anderson, (*A. T. Smith* with him,) for the plaintiff.

W. H. Hitchcock, for the defendant.

HAMMOND, J. One of the grounds of the defence was that in the lease from the defendant to Mrs. St. Ledger, from whom the plaintiff hired the room, there was a clause to the effect that the lessee should not lease, underlet nor permit any other person to occupy the premises named in the lease, without the written consent of the lessor; and the defendant undertook to prove the existence of such a provision.

The lease was executed in duplicate, one being retained by the lessor and the other given by him to the lessee. Each was therefore an original, and as evidence of the contract could have been introduced without the production of the other. The de-

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fendant testified that he had searched for his paper and could not find it. Upon this evidence the judge could have found, and it is to be assumed that he did find, that it was lost. If this had been the only original, secondary evidence of its contents of course could have been admitted. But it was not the only original. The other was presumed to be in the possession of Mrs. St. Ledger, the lessee, to whom the defendant had given it. A witness called by the plaintiff testified on cross-examination that Mrs. St. Ledger was living on Massachusetts Avenue in Boston, the place of the trial, and that the witness knew of no reason why she could not be present at the trial. It does not appear that any effort whatever was made to procure the original which had been delivered to her. Upon the evidence it is to be presumed that the paper was within the jurisdiction of the court.

Here, then, is the case of two originals, one lost and one presumably still in the hands of a third party within reach of the court. Under these circumstances the rule is that no secondary evidence of the contents of either is admissible until it is shown that reasonable effort has been made to procure the other. All originals must be accounted for before secondary evidence can be given of any one. Stark. Ev. (10th Am. ed.) 542, *ad finem*, and cases therein cited. 1 Greenl. Ev. § 563, and cases cited. 2 Wigmore Ev. § 1233, and cases cited. See also *Poignand* v. *Smith*, 8 Pick. 272. The exception to the admission of the oral evidence of the contents of the lease must be sustained.

It is contended by the plaintiff that, even if there was such a provision in the lease as the defendant described, still the contract between the plaintiff and Mrs. St. Ledger was not in violation of it. The precise nature of this contract, however, is not clearly set forth in the bill of exceptions; and it is better that this question should not be decided until, in addition to the exact provisions of the lease, the nature of the contract between the plaintiff and the original lessee is more definitely shown.

Exceptions sustained.

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ERNEST R. BUFFINGTON *vs.* WILLIAM T. McNALLY & trustee.

Suffolk. March 28, 1906. — May 31, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, BRALEY, & SHELDON, JJ.

Contract. Evidence. Agency. Practice, Civil, Parties.

In an action for alleged breach of a contract in writing to hire a certain hall from the plaintiff for Saturday nights from October 10, 1903, to June 1, 1904, inclusive, it appeared that the defendant signed the following agreement in writing: "September 25, 1903. I do hereby agree to hire Armory Hall for Saturday nights commencing October 10th, to run socials from 8 to 11.30 and conduct same in satisfactory manner according to law, etc. I hereby place a deposit of $10 to bind the bargain and agree to deposit $50 the 15th day of October. Said $50 to remain as a deposit on the hall until June 1, 1904. Price of hall to be $15 each night including the check room. Payable balance ($5) October 10th and $15 each Saturday night thereafter. If necessary, to hire an officer at my expense." The plaintiff was allowed to testify, against the objection of the defendant, that when the defendant signed the agreement the plaintiff told him orally that he would let the hall to him for the season and that the defendant stated that he wanted to take the hall for the season, and was allowed to testify further that the season for the letting of such halls lasted until the end of May. *Held*, that the evidence was admitted properly to explain the ambiguous terms of the contract.

An agent may sue on an agreement in writing made by him in his own name in behalf of an undisclosed principal.

If an agent suing on a contract made by him in his own name in behalf of an undisclosed principal describes himself in his writ as agent, this designation does not affect his right to recover in his own name or make admissible evidence offered by the defendant to show that the contract was that of the undisclosed principal.

An agreement to hire a hall on Saturday night of each week during a season lasting to a certain date, which has been accepted by the acts of the person authorized to furnish the use of the hall and during a part of the season has been performed by both parties, is binding on both of them for the whole of the season, and the obligation to pay for the hall is not confined to its use and occupation.

CONTRACT, for the alleged breach of an agreement in writing, quoted in the opinion, to hire of the defendant a certain hall called Armory Hall, in that part of Boston called Roxbury, for Saturday nights from October 10, 1903, to June 1, 1904, inclusive; further alleging a special oral agreement for the use of the hall on Christmas, 1903, and February 22, 1904. Writ in the Municipal Court of the City of Boston dated June 13, 1904,

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the plaintiff being named in the writ as "Ernest R. Buffington, agent."

On appeal to the Superior Court the case was tried before *Hardy*, J., without a jury.

The defendant admitted signing and delivering to the plaintiff the agreement in writing, a copy of which was annexed to the plaintiff's substituted declaration, and also admitted hiring the hall by an oral agreement for the holidays charged for in the declaration at the price therein named. It was agreed by the parties that the defendant occupied the hall on Saturday evenings beginning October 10, 1903, and continuing up to February 22, 1904, and thereafter did not occupy or use the hall at all.

The plaintiff testified that, at the time the defendant signed the agreement in writing, the plaintiff stated orally to the defendant that he would let the hall to him for the season, and that the defendant stated that he wanted to take the hall for the season, and the plaintiff testified that the season for the letting of such halls lasted to the last of May, and that at the time of such letting he looked at the calendar to see when the last Saturday of May came. The judge admitted this evidence against the defendant's objection and exception.

The plaintiff also offered evidence tending to show that he kept the hall ready for the defendant's use, was willing he should use it, and so notified the defendant.

It was admitted by the parties that the defendant had paid the plaintiff in full for every evening on which he had occupied or used the hall, except the evening of February 13, 1904, and as to the last named evening the defendant testified that he had paid $10 in cash on account thereof, and had given a note for $5 for the balance, which note was produced by the plaintiff at the trial in response to a demand by the defendant for its production, and which was still in possession of the plaintiff. The defendant testified that he did not agree to take the hall for a season ending the last of May, and further testified that the plaintiff complained to him that he was conducting dances in the hall in a manner not at all satisfactory to the plaintiff, and further testified that on February 22, 1904, the plaintiff notified him that he could not have the hall after that date, and that this was the reason why he did not use it longer. The

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defendant further testified, and this was admitted by the plaintiff, that he deposited $50 with the plaintiff on October 16, 1903, in accordance with the terms of the agreement in writing, which deposit was at the time of the trial in the plaintiff's hands.

The defendant also testified, and this was not denied by the plaintiff, that the plaintiff never asked him in any way to pay anything after February 22, 1904, and never sent him a bill of any kind, but that the first demand made upon him was the bringing of this action and the attachment of his funds in the city's hands. The defendant admitted that he had never before the bringing of this action demanded back his deposit of $50 from the plaintiff.

The defendant offered evidence to show that the plaintiff was not the owner of the building in which the hall was situated, but that during the time from October 10, 1903, to June 1, 1904, he was only an agent to manage the hall and collect the rents, and contended that therefore he could not bring this action in his own name. Upon objection by the plaintiff the judge excluded this evidence and offer of proof and ruled that the evidence offered was not admissible. To the exclusion of this evidence the defendant excepted.

This was all the evidence material to the issue. At the close of the evidence and before the arguments were begun the defendant requested the judge to rule as follows:

1. That the written contract or paper set forth in the plaintiff's declaration does not provide for a letting of the hall for any specified time, and that the defendant cannot be held liable on this writing for rent, or for use and occupation, of the hall for any period, or days, when it was not used by the defendant.

2. That the writing set out in the plaintiff's declaration relates to an interest in and concerns real estate as provided in R. L. c. 74, § 1, cl. 4, and, such writing not providing for a letting of the hall for any specified time, this action by reason of clause four cannot be maintained for any period or time during which the defendant did not use or occupy the hall.

3. Upon all the evidence in this case, this action cannot be maintained.

4. Under the evidence in this action, the action cannot be maintained in the name of the plaintiff.

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The judge refused to rule as requested, and found for the plaintiff in the sum of $211.97, and for the defendant in set-off in the sum of $52.99. The defendant alleged exceptions.

W. B. Orcutt, for the defendant.

C. T. Cottrell, for the plaintiff.

BRALEY, J. This is an action of contract to recover under the first count damages for breach of the following written agreement signed by the defendant: "September 25, 1903. I do hereby agree to hire Armory Hall for Saturday Nights Commencing Oct. 10 to Run Socials from 8 to 11.30 & Conduct same in satisfactory manner according to law etc — I hereby place a deposit of Ten ($10) Dollars to bind the bargain & agree to deposit ($50) Fifty Dollars the Fifteenth day of October — Said fifty dollars to remain as a deposit on the hall until June 1st, 1903 [1904] — Price of hall to be Fifteen ($15) Dollars each night including the check room — Payable balance ($5 dollars) Oct. 10th & fifteen dollars — each Saturday night thereafter. If necessary to hire an officer at my expense." And under the second count for breach of an oral agreement relating to the use of the hall on two holidays during the period covered by the first contract. In the Superior Court the presiding judge, before whom the case was tried without a jury, having found for the plaintiff, it is before us on the exceptions of the defendant, which refer solely to the first count.

Treating the contract at its inception as unilateral, upon acceptance it became binding upon both parties. *Bishop* v. *Eaton*, 161 Mass. 496. The first question raised is that no period of time being specified parol evidence that the hiring of the hall was for the season, which ended June 1, 1904, was inadmissible. The time named is an impossible date as it refers only to the past, but the whole instrument indicates that the hiring was intended to be for a definite term, and as the contract thus became of doubtful meaning the attendant circumstances may be shown to aid in its interpretation. *Stoops* v. *Smith*, 100 Mass. 63, 66. Assuming that upon the evidence the second recital of "1903" was found by the trial court to be intended by the parties for the year 1904, no definite term is fixed during which the defendant could exercise the right for which he bargained, even if the deposit was to remain in the possession of the plaintiff as

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security for the rental until this date. It is true that resort cannot be had to oral evidence in order to vary or contradict what the parties have expressed by their written agreement, but this rule does not include such testimony when offered by way of explanation of a latent ambiguity, and in proof of the subject matter that must have been within the contemplation of the parties, but not clearly expressed in the writing. *Hebb* v. *Welsh*, 185 Mass. 335, 336, and cases there cited. *Stoops* v. *Smith*, *ubi supra*. The parties must have intended that the occupation of the hall by the defendant included a definite number of Saturday evenings ending at the time named, but they failed expressly to set this forth, and no denial of the fact that the defendant availed himself of the provisions of the contract until February, 1904, was made at the trial. Under these conditions, and in aid of its construction, the testimony of the plaintiff that he stated when the contract was executed that the letting was for the season, to which the defendant assented, was competent, not as enlarging the agreement, but to identify the time which they intended to cover. *Stoops* v. *Smith*, *ubi supra*. From this evidence, although denied by the defendant, it could have been found that both understood the term used in the same sense, and it would follow that the plaintiff's subsequent definition of "season," that it meant a period expiring the last Saturday of the following May also was admissible. *Stoops* v. *Smith*, *ubi supra*. *Aldrich* v. *Aldrich*, 135 Mass. 153, 157. *Hebb* v. *Welsh*, *ubi supra*.

Whatever confusion there may have been in some of the earlier cases, it is settled by *Colburn* v. *Phillips*, 13 Gray, 64, in which they are reviewed, "that where a contract, not under seal, is made with an agent in his own name, for an undisclosed principal, either the agent or the principal may sue upon it," and since then in this jurisdiction this has been the law. *Borrowscale* v. *Bosworth*, 99 Mass. 378, 383. *Rhoades* v. *Blackiston*, 106 Mass. 334, 335. *Terry* v. *Brightman*, 132 Mass. 318. See *Cushman* v. *Snow*, 186 Mass. 169, 173, 174. But as either could sue on the contract if broken, the defendant's offer of proof of an undisclosed principal was rightly excluded, as this evidence was immaterial. The plaintiff having executed the contract on his part, the defendant's promise rested on a sufficient consideration. *Colburn* v. *Phillips*, *ubi supra*. In the

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writ the plaintiff described himself merely as agent, without further description, and from this designation it also is contended that the evidence should have been admitted, but this admission may be treated as a designation only, and because unnecessary his right to recover in his own name remained unimpaired. *Silver* v. *Jordan*, 136 Mass. 319. See *Simonds* v. *Heard*, 23 Pick. 120, 126; *Plimpton* v. *Goodell*, 126 Mass. 119, 120.

The first and fourth requests, "That the written contract or paper set forth in the plaintiff's declaration does not provide for a letting of the hall for any specific time, and that the defendant cannot be held liable on said writing for rent, or for use and occupation, of said hall for any period, or days, not used by the defendant," and that "Under the evidence in this action, said action cannot be maintained in the name of the plaintiff," therefore, were properly refused. The second request, which also was refused, that the contract concerned an interest in real property and was within the provisions of R. L. c. 74, § 1, cl. 4, not having been argued, must be treated as waived.

It is further suggested that the agreement itself, being incomplete, is to be considered as nothing more than an offer to hire which never became a completed contract,* but the proposal having been accepted, and the consideration furnished by the plaintiff, and also having been presently executed by the defendant exercising the privilege or license conferred, this argument cannot prevail. *Johnson* v. *Wilkinson*, 139 Mass. 3.

After February 22, 1904, although the defendant did not use the hall, yet with his knowledge and without his dissent it was kept ready for his use on each succeeding Saturday evening until the end of the season; consequently having failed to fully perform his contract he must respond in damages to the plaintiff for the loss suffered. *Johnson* v. *Wilkinson*, *ubi supra*.

Exceptions overruled.

* The defendant contended that there was nothing in the instrument signed by him which bound him to pay for any time beyond the nights upon which he had used and occupied the hall; that the paper was no more than an offer, binding upon no one except so far as it had been executed, and only to that extent was an accepted offer.

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EDGAR W. CARLETON *vs.* FLOYD, ROUNDS AND COMPANY & another.

Suffolk. December 14, 1905. — June 7, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Frauds, Statute of.

An oral promise by one who is a stockholder in a corporation and is engaged in its business as a salesman, and who is about to acquire the business of the corporation, to pay the debt of a creditor of the corporation if he will refrain from attaching the property of the corporation and putting a keeper in its place of business, is a special promise to answer for the debt of another within R. L. c. 74, § 1, cl. 2, on which no action can be sustained without a memorandum in writing signed by or in behalf of the party to be charged.

CONTRACT against Floyd, Rounds and Company, a corporation organized under the laws of this Commonwealth, and A. W. Rounds, doing business under the name of A. W. Rounds and Company, for $587.94. Writ in the Municipal Court of the City of Boston dated January 19, 1901.

The defendant corporation filed a general denial. The answer of the defendant Rounds contained a general denial and set up the statute of frauds.

On appeal to the Superior Court the case was tried before *Lawton*, J. No question was raised as to parties or pleadings. There was evidence tending to show that about June, 1900, the defendant corporation, doing business in Boston as a wholesale dealer in watches and jewelry, was indebted to the plaintiff in the sum of $587.94 for services performed by the plaintiff for the corporation; that the defendant Rounds was a stockholder in the corporation and a salesman engaged in its business; that about June, 1900, a creditor of the corporation brought an action against it and attached the property of the corporation at its place of business, putting a keeper in charge; that the plaintiff and the defendant Rounds had a conversation while the keeper was in possession, in which the plaintiff told Rounds that he also intended to put in a keeper; that about two days after this conversation, and while the keeper was in

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possession, the plaintiff and Rounds had another conversation, in regard to which the plaintiff testified as follows:

"Two days afterwards, he, Rounds, came to me and told me that he had a proposition to make, whereby he could take over the business of the Floyd Rounds Company and have it himself, provided that I would not put in a keeper or do anything to block him from getting possession of the business. Well, I told him that if he would pay me what the concern owed me that I would do nothing to block the business or put in a keeper, and he said he would, that I should be the first one that should be paid. And I therefore didn't put in a keeper, expecting that he would keep his word."

There was further evidence tending to show that the defendant Rounds did acquire, within two or three months after the last conversation, the property and business of the corporation; that the plaintiff saw Rounds at his place of business, and Rounds stated that he had assumed the whole thing and got the business; that the plaintiff requested payment of the amount due him, and, although promised payment from time to time by Rounds, he never was paid.

Upon this evidence the judge ruled that the plaintiff was not entitled to recover against Rounds, and the jury, by direction of the judge, returned a verdict for that defendant. The plaintiff alleged exceptions.

A. K. Cohen & S. Bamber, for the plaintiff.

H. L. Baker & M. Freiman, for the defendant Rounds.

HAMMOND, J. This case cannot be distinguished in principle from *Ames* v. *Foster*, 106 Mass. 400.

The following language used by Morton, J. in that case is peculiarly applicable to this: "The defendant's promise was, in its primary and essential character, a promise to guarantee the debt of another. Its object was, to secure the payment of the old debt, which was not extinguished. The defendant's liability was collateral and contingent, would exist as long as the original debt existed, and would be extinguished whenever the original debtors should pay that debt. It was not in any sense his debt; the original party remained liable; and there is an entire absence of any liability on the part of the defendant or his property, except such as arises from his express promise. *Forth* v.

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Stanton, 1 Saund. (6th ed.) 211, note. When all these elements concur, we know of no case in this Commonwealth which sanctions the doctrine that such promise loses its character as collateral, and becomes an original promise, because there is a consideration which is beneficial to the promisor." In addition to the cases cited in the opinion in that case see also *Brightman* v. *Hicks*, 108 Mass. 246, and *Fullam* v. *Adams*, 37 Vt. 391. The case is clearly distinguishable from cases where the leading object and effect of the transaction is the purchase or acquisition by the promisor from the promisee of some property, as in *Paul* v. *Wilbur*, 189 Mass. 48, cited by the plaintiff, or the discharge of some lien upon the property of the promisor, the benefit of which discharge directly enures to the promisor, as in *Castling* v. *Aubert*, 2 East, 325. Such a transaction is in the nature of a purchase of property or of a property right.

Exceptions overruled.

MERRIMAC CHEMICAL COMPANY *vs.* AMERICAN TOOL AND MACHINE COMPANY.

AMERICAN TOOL AND MACHINE COMPANY *vs.* MERRIMAC CHEMICAL COMPANY.

Suffolk. November 16, 1905. — June 18, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Sale, Warranty. *Contract. Negligence.*

In an action, by a corporation manufacturing chemicals against a corporation manufacturing tools and machinery, for money paid by the plaintiff to the widow and administratrix of one of its employees who was killed by the explosion of the revolving basket of a centrifugal drier which was sold to the plaintiff by the defendant, caused by the excessive speed of the revolutions alleged to have been due to the fact that the machine was fitted with a driving pulley fifteen inches in diameter instead of one that was twenty-four inches in diameter, it appeared, that the machine was ordered by the plaintiff's superintendent and, there being a delay in the delivery, the superintendent called up the defendant on the telephone and asked the person answering to send him a blue print of the machine, which he did, that the size of the driving pulley was given on the blue print as twenty-four inches in diameter, and the speed of the basket was marked at thirteen hundred and twenty revolutions per minute, that the plaintiff's superintendent turned

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over the blue print to the mill architect, who two months after the machine was delivered did the work of calculating the size of the pulleys and the revolutions of the different shafts and planned the shafting for a pulley twenty-four inches in diameter, that the defendant, which had no notice of the use which was to be made of the blue print, sent the machine with a driving pulley fifteen inches instead of twenty-four inches in diameter, the effect of which was that with the shafts and pulleys as planned by the mill architect the revolutions of the basket would be increased from thirteen hundred and twenty per minute to two thousand or twenty-two hundred per minute, that the work of setting up the machine was done by an outside person employed by the plaintiff to do the work under the general supervision of the plaintiff's chief engineer, that both the chief engineer and the person employed to do the work noticed when the machine was set up that the size of the driving pulley was not the same as shown on the blue print, and the chief engineer knew that the pulley would make the machine go much faster than a twenty-four inch pulley, that these machines were manufactured and sold by the defendant in the general market to be set up and connected in the factory by the purchaser, that a driving pulley of some sort usually was sent with each machine, and the defendant furnished a pulley according to the speed of the main shaft if that was given, but that in this case no particular size of driving pulley was asked for and the defendant knew nothing about the speed of the plaintiff's engine or shaft, that the defendant's manager did not know until after the accident that the blue print had been sent, that a bill of the machine and the articles sent with it was sent by the defendant to the plaintiff about the time that the machine was sent, and that in this bill the pulley was described as a fifteen inch pulley. *Held*, that even if the blue print constituted an implied representation or warranty of the size of the pulley, which was doubted, there was no evidence warranting a finding that the plaintiff was justified in relying on the representation or was free from negligence in doing so, knowing that the size of the pulley furnished was smaller than that represented on the blue print and that the result would be to make the machine go much faster, and that a verdict properly was ordered for the defendant.

TWO ACTIONS, the first an action of contract or tort brought by the Merrimac Chemical Company on behalf of the Employers' Liability Assurance Corporation, to recover the sum of $891 paid by the latter corporation in settling the claim of Ellen Murphy, the widow and administratrix of one Daniel Murphy, who received injuries from the explosion of a centrifugal hydro-extractor or drier while in the employ of the Merrimac Chemical Company, causing his death after conscious suffering; and the second an action of contract brought by the American Tool and Machine Company to recover for labor and materials furnished by the plaintiff in repairing the hydro-extractor after the explosion. Writs dated October 14 and November, 1901.

In the Superior Court the cases were tried together before *Aiken*, C. J. The substance of the evidence is stated in the

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opinion. At the close of the evidence the Chief Justice ruled in the first case that upon all the evidence the plaintiff could not recover and ordered a verdict for the defendant; and in the second case, no defence being set up except the evidence offered in support of the first case, ordered a verdict for the plaintiff for the amount named in the declaration. The Merrimac Chemical Company, being the plaintiff in the first case and the defendant in the second case, alleged exceptions.

J. Lowell & J. A. Lowell, for the Merrimac Chemical Company.

W. F. Garcelon, for the American Tool and Machine Company.

MORTON, J. These two actions were tried together. The judge ruled in favor of the defendant in the first, and for the plaintiff in the second. The second is defended on the same grounds in substance on which the first is brought, and it follows that if the ruling for the defendant in the first action was right, then that in the second was also. The first is an action to recover the amount paid by the plaintiff after notice to the defendant to settle a claim made upon it by the administratrix of one Murphy who died in consequence of injuries received from the bursting of a revolving basket,* so-called, while at work on a machine in the defendant's employ. The machine was furnished to the Chemical Company, which we shall speak of as the plaintiff, by the Tool and Machine Company which we shall call the defendant. It was ordered by the plaintiff's superintendent. There was delay in the delivery, and the superintendent "after waiting quite a long time" called up the defendant on the telephone and asked them to send him a blue print of the machine which they did. The size of the driving pulley was given on the blue print as twenty-four inches in diameter. The number of revolutions of the counter shaft on which the driving pulley is mounted was given at "275 R. P. M." meaning two hundred and seventy-five revolutions per minute. The speed of the basket is marked as "1320 R. P. M." meaning one thousand three hun-

* The superintendent of the Merrimac Chemical Company in testifying defined the appliance as follows: "The basket of a centrifugal drier is a perforated pot arrangement on a vertical shaft, and the centrifugal force forces out the moisture through the perforations."

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dred and twenty revolutions per minute. The blue print was turned over by the superintendent to the mill architect, who "did the work of calculating the size of the pulleys and the revolutions of the different shafts" "to use in laying out his shafting plan," and he planned the shafting for a pulley twenty-four inches in diameter. The defendant did not know the use which was to be made or was made of the blue print. The machine when sent instead of having a driving pulley twenty-four inches in diameter had one of fifteen, the effect of which was, with the shafts and pulleys as planned by the mill architect, to increase the revolutions of the basket from one thousand three hundred and twenty per minute to two thousand, or two thousand two hundred. The actual work of setting up the machine was done for the plaintiff by another concern, J. T. Freeman and Company, and one Godfrey was employed by them to do the work. The plaintiff's chief engineer had a general supervision over the work. There was testimony, which was uncontradicted as to the chief engineer, that both he and Godfrey noticed when the machine was set up that the size of the driving pulley was not the same as shown on the blue print, and the chief engineer testified "that he knew it would make the machine go much faster than a twenty-four inch pulley," as it is obvious that it would with the same shafting and pulleys. There was uncontradicted testimony on the part of the defendant from its manager that the machines were manufactured and sold in the general market to be set up and connected in the factory by the purchaser; that no particular size of driving pulley formed a part of the machines but a driving pulley of some size was usually sent with each machine; that they furnished a pulley according to the speed of the main shaft if that was given them; that in this case no particular size of driving pulley was asked for and the defendant knew nothing about the speed of the plaintiff's engine, or shaft, or of the pulley on the shaft to which the machine was to be belted and had nothing to do with setting it up. He further testified that the blue print was from their office and must have been furnished to some one from their office; that they furnished blue prints to any one inquiring about the machines and that he didn't know of the blue prints being furnished to the plaintiff till after the accident. It appeared

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and was uncontradicted that a bill of the machine and the articles shipped with it was sent by the defendant to the plaintiff about the time that the machine was sent, which was apparently some time after the plaintiff had received the blue print, and that the pulley was described in this bill as a fifteen inch pulley. It also appeared, and likewise was uncontradicted, that the machine was in the plaintiff's possession and had been for upwards of two months at the time that the mill architect began to plan the shafting and pulleys in connection with it.

The plaintiff does not contend that anything was said about the size of the driving pulley when the order was originally given. It contends that the blue print amounted to an implied representation or warranty that the machine would have a driving pulley twenty-four inches in diameter, on which the mill architect was justified in relying in planning the connecting shafts and pulleys, and that the defendant is liable for any injuries that resulted in consequence of the pulley being fifteen inches in diameter instead of twenty-four.

We greatly doubt whether the blue print constituted an implied representation or warranty of the size of the pulley. There is nothing to show that the defendant knew for what purpose the blue print was wanted, or that it did anything more than send it as requested. But, assuming that the pictorial representation of a driving pulley twenty-four inches in diameter contained in the blue print constituted under the circumstances an implied undertaking on the part of the defendant that the driving pulley would be of that size, it does not follow that the defendant is liable. In order to render the defendant liable the plaintiff not only must have relied upon the representation but the circumstances must have been such as to warrant it in so doing and to exonerate it from negligence on its part. We do not think that the evidence warranted a finding that the plaintiff was justified in relying on the representation or was free from negligence in so doing. The machine was put together and set up in the plaintiff's works by its servants and employees. There was uncontradicted evidence that they knew that the size of the pulley was not as represented on the blue print but was smaller and that the result would be to make the machine go much faster. There was also uncontradicted evidence that the bill of

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the machine showed that the pulley was a fifteen inch pulley and that the machine had been in the possession of the plaintiff upwards of two months before the plaintiff's architect began to plan the shafting and pulleys required to convey power to it. It also appeared as already observed that the speed of the basket as well as of the pulley was marked on the blue print and that the speed of the machine depended on the various pulleys between it and the engine.

Under such circumstances we think that the plaintiff was not justified in relying on the representation, assuming that there was one, and that there was negligence on its part in putting in shafting and pulleys that would drive the basket at a faster rate than that designated. The case of *Boston Woven Hose & Rubber Co.* v. *Kendall*, 178 Mass. 232, relied on by the plaintiff, differs materially from this. In that case the machine was sold to stand a working pressure of one hundred pounds to the square inch which it did not do in consequence of a defect in the construction which should have been discovered and remedied by the manufacturer. The plaintiff did not know, and had no reason to know as between it and the defendant, that the machine would not stand the pressure which it was warranted to stand and the court held that it was justified in relying on the representations of the defendant. The result is that the exceptions must be overruled in both cases.

So ordered.

HARLAN P. WHITCOMB *vs.* CITY OF BOSTON.

Suffolk. December 5, 1905. — June 18, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Deed. Contract. Tax, Assessments for benefits. *Municipal Corporations. Boston.*

In an action against the city of Boston to recover a sum of money which the plaintiff had been compelled to pay as a betterment assessment upon his land on account of the laying out and construction of a certain street, it appeared that the plaintiff and others executed a deed to the city purporting to be a conveyance of land in fee simple and containing a condition or an agreement that the city should

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assume any betterments assessed upon the plaintiff's land on account of the laying out and construction of the street in question and would save the plaintiff harmless therefrom, that more than a year after its date this deed was taken to the office of the street commissioners and there put in a pigeon hole in which such papers that had not been acted upon or accepted were kept together, that at the time the deed was brought to the office it was not the practice of the street commissioners to accept such papers although it had been their practice to do so at the time the deed was dated, that there was no reference to the deed in any record of the street commissioners or of any board or department of the city, that the deed never was taken by the officer who had the custody of valuable papers belonging to the city, and never was recorded. *Held*, that there was no evidence to warrant a finding that the deed ever was accepted by the city.

Except under St. 1902, c. 503, the street commissioners of the city of Boston cannot make an executory agreement on behalf of the city not to assess betterments for the laying out of a street, although their official action followed by the action of the authorities authorized to construct a street may constitute an acceptance of an offer made by landowners to induce the laying out of a street.

CONTRACT with two counts, the first to recover the amount of a betterment assessment alleged to be invalid and paid by the plaintiff under protest, and the second for damages for breach of a covenant contained in a certain deed of release, both counts being for the same cause of action. Writ in the Municipal Court of the City of Boston dated May 8, 1901.

On appeal to the Superior Court the case was tried before *Bond*, J., without a jury, and the facts were shown which are stated in the opinion. At the close of the evidence the defendant asked the judge to rule that on all the evidence the plaintiff was not entitled to recover. The judge refused to rule as requested, and found for the plaintiff on the second count in the sum of $465.55, which was the amount paid by the plaintiff, with interest from the date of payment to the date of the writ. The defendant alleged exceptions.

The case was submitted on briefs at the sitting of the court in December, 1905, and afterwards was submitted on briefs to all the justices.

P. Nichols, for the defendant.

E. O. Cooke & W. B. Grant, for the plaintiff.

KNOWLTON, C. J. The question in this case is whether there was any evidence to warrant the finding for the plaintiff upon the second count of the declaration. This count is founded upon the alleged acceptance by the defendant of a deed from the plaintiff and others, containing a condition or an agreement that

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the city should assume any betterments assessed upon the plaintiff's land on account of the laying out and construction of a street referred to, and save the plaintiff harmless therefrom.

There was no evidence tending to show that this deed was accepted by the city. It purports to be a conveyance of land to the city in fee simple. The instrument was never taken by the officer who has the custody of valuable papers belonging to the city, and was never recorded. According to the uncontradicted testimony of Jenkins, the secretary of the board of street commissioners, it was put in a pigeon hole in which such papers that had not been acted upon or accepted were kept together. The testimony was that, at the time when this paper was brought to the office of the street commissioners, it was not the practice of that board to act upon or accept such papers, although it had been their practice to accept them a year or two before, when this paper was dated. It bore date December 24, 1891, and was taken to the office of the street commissioners on January 10, 1893. There is no reference to it in any record of the street commissioners or of any board or department of the city. There was no evidence to warrant a finding that it was ever accepted by the city. The case is very different from *Bartlett* v. *Boston*, 182 Mass. 460, cited by the plaintiff.

It is not contended that this is an agreement in writing of the board of street commissioners, whereby the city is bound under St. 1884, c. 226, (R. L. c. 50, § 11,) now superseded by St. 1902, c. 503. See *Bartlett* v. *Boston*, *ubi supra*. Except under this statute, the board of street commissioners cannot bind the city by a contract to give up valuable rights, like betterments assessable upon the laying out of a street. They are a board of public officers, acting judicially in matters relating to the laying out of streets. They have no authority to make any kind of executory contract to bind the city, except under this statute.

They may by their official action, followed by action of authorities of the city in the construction of a street, supply a consideration on the part of the city, so as to make binding a unilateral contract presented by a landowner as an offer by way of inducement to the laying out of a street. *Bell* v. *Boston*, 101 Mass. 506, 510. *Crocket* v. *Boston*, 5 Cush. 182, 188. *Aspin-*

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wall v. *Boston*, 191 Mass. 441. But these cases do not intimate that they can make an executory contract binding upon the city, or that they alone can make any contract that shall deprive the city of valuable rights.

Exceptions sustained.

HARRIOT A. NEWCOMB, executrix, *vs.* TRUSTEES OF PINE GROVE CEMETERY & others.

Bristol. January 2, 1906. — June 18, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, & SHELDON, JJ.

Devise and Legacy.

A testatrix bequeathed one half of her personal property to her husband during his life and after his decease bequeathed it to her daughter "absolutely, if she shall be living at the time of my husband's decease, subject to certain other bequests hereinafter made." Five paragraphs enumerating the other bequests referred to were preceded by the following direction: "In the event that my said daughter shall not be living at the time of the decease of my said husband, then immediately upon his decease, I direct my executrix hereinafter to be named, to pay the following bequests." One of the five bequests was to the trustees of a certain chapter of a certain order "in case the said chapter shall be in existence at the death of my said husband," and there was a further direction to pay the five bequests from the personal property of her estate remaining at the death of her husband if sufficient, or, if not sufficient, that a sufficient amount of the real estate remaining at the death of her husband should be sold to pay the bequests. *Held*, that the gift to the daughter was an absolute one subject to the five bequests, and that these bequests were payable immediately on the death of the husband and were not deferred until the death of the daughter.

BILL IN EQUITY, filed in the Probate Court for the county of Bristol on February 24, 1905, by the executrix under the will of Betsey T. Hayward for instructions.

The will was as follows:

"I, Betsey T. Hayward, wife of William A. Hayward, of the city of New York, in the State of New York, declare this to be my last will and testament.

"Item 1st. I give and bequeath to my beloved daughter Harriet B. Hayward, all my jewelry, trinkets, wearing apparel, linen, books, pictures, prints, plate, silverware, china, household goods, furniture and fixings.

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"Item 2d. I give and bequeath to my said daughter Harriet B. absolutely, the one half of all the money, stocks, bonds, mortgages, debts, rents and dividends, and all other personal property belonging, due or owing to me at the time of my death.

"Item 3d. I give and devise to my said daughter Harriet B. to her sole and separate use, the one half of all the real estate of whatever nature or character of which I may die seized or that may be belonging and coming to me from the estate of my father the late Nathaniel Newcomb of the Town of Norton in the State of Massachusetts, or from any and all other sources at the time of my decease, together with all the hereditaments and appurtenances thereto belonging or in any wise appertaining, to have and to hold the premises above described to the said Harriet B. Hayward, her heirs and assigns forever.

"Item 4th. I give and bequeath to my beloved husband William A. Hayward, during his natural life, the one half of all the personal property belonging, due and owing to me at the time of my decease, excepting the same stated and set forth in the first item of this will. And after his decease, I give and bequeath the same to my said daughter Harriet B. absolutely, if she shall be living at the time of my husband's decease, subject to certain other bequests hereinafter made.

"Item 5th. I give and devise to my said husband William A. Hayward the one half of all the real estate of whatever nature and character of which I may die seized, or that may be belonging and coming to me from the estate of my father the said Nathaniel Newcomb and from any and all other sources, at the time of my decease, together with all the hereditaments and appurtenances thereto belonging, or in any wise appertaining, to have and to hold the premises above described, to the said William A. Hayward, during his natural life. And after his decease I give and devise the same to my said daughter Harriet B. to have and to hold the said premises above described to my daughter Harriet B. Hayward, her heirs and assigns forever.

"Item 6th. In the event that my said daughter Harriet B. shall not be living at the time of the decease of my said husband, William A. then immediately upon his decease, I direct my executrix hereinafter to be named, to pay the following bequests.

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"First. I give and bequeath to the Selectmen, or other proper officers of the Town of Norton, in the State of Massachusetts, and to their successors forever, in trust, the sum of two thousand dollars, for the benefit of the Burying Ground in the said Town of Norton, known as 'Timothy's Plain' to be applied by my said trustees in keeping the said Burying Grounds in proper condition, that is to say, to keep the same well fenced, with good gates, walks, and to plant trees and flowers and keep the grass in good condition.

"Second. I give and bequeath to the trustees or other proper officers of the 'Pine Grove Cemetery' in the town of Milford, in the State of Massachusetts, and to their successors forever in trust, the sum of two thousand dollars for the benefit of the said 'Pine Grove Cemetery,' in keeping the same in proper condition and order, as the proper officers of the said cemetery may deem best.

"Third. I give and bequeath to the trustees or other proper officers of the said 'Pine Grove Cemetery,' in the said Town of Milford, and to their successors in trust forever, the further sum of one thousand dollars for the benefit of the Family Lot, standing in the name of William A. Hayward, in the said 'Pine Grove Cemetery' to be used by the said officers in keeping the said Family Lot in good and becoming condition, that is to say, to keep the grass properly cut, and plant annually, and keep in order shrubs and flowers and all other necessary and proper attentions.

"Fourth. I give and bequeath to my adopted daughter Almira Hayward, now the wife of —— Pierce of Milford in the State of Massachusetts, whose Christian name is to me unknown, the sum of one thousand dollars absolutely, to her sole and separate use.

"Fifth. I give and bequeath to the trustees of Laurel Chapter No. 44, Order of the Eastern Star, in the City of New York, and to their successors forever, in case the said Chapter shall be in existence at the time of the death of my said husband, the sum of one thousand dollars absolutely. And I direct my executrix hereinafter to be named, to pay the said bequests set forth in this item from the personal property of my estate that shall remain at the death of my said husband, in case there shall be

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sufficient therefor. And in the event that there shall not remain a sufficient amount of my personal estate, then I direct my said executrix to pay the same from the money received from the sale of a sufficient amount of my real estate that shall remain at the time of the death of my husband.

"Item 7th. I hereby appoint my beloved sister Harriot A. Newcomb to be the sole executrix of this will, revoking all former wills by me made.

"In witness whereof, I, Betsey T. Hayward have to this my last will and testament, consisting of one sheet of legal cap paper, subscribed my name and set my seal this second day of June A. D. 1877."

Here followed the signature and seal of the testatrix and an attesting clause with the signatures of three witnesses.

In the Probate Court *Fuller*, J. made a decree that the several bequests in Item 6th were not payable during the life of Harriet B. Minchew, formerly Harriet B. Hayward, and the executrix was directed to hold the sum of $7,000 of the personal estate of the testatrix and to pay the income thereof to Harriet B. Minchew during her life. The trustees of Pine Grove Cemetery, Almira H. Pierce and Laurel Chapter No. 44 Order of the Eastern Star appealed.

The case came on to be heard before *Braley*, J., who reserved it upon the pleadings, which contained a full statement of all the material facts, for determination by the full court.

A. Fuller & W. J. Davison, for Harriet B. Minchew, a daughter of the testatrix.

C. F. Williams, for certain legatees named in the sixth clause of the will of the testatrix.

MORTON, J. This is a petition by the executrix of the will of Betsey T. Hayward for instructions as to the time when certain legacies given by that will are payable. The clauses under which the question arises are the fourth and the sixth. The fourth is as follows: "Item 4th. I give and bequeath to my husband William A. Hayward, during his natural life, the one half of all the personal property belonging, due and owing to me at the time of my decease, excepting the same stated and set forth in the first item of this will. And after his decease, I give and bequeath the same to my said daughter Harriet B. abso-

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lutely, if she shall be living at the time of my husband's decease, subject to certain other bequests hereinafter made." The sixth clause is this: "Item 6th. In the event that my said daughter Harriet B. shall not be living at the time of the decease of my said husband, William A., then immediately upon his decease, I direct my executrix hereinafter to be named, to pay the following bequests," then follow the bequests, five in all. Two of them are for the benefit of cemeteries in Norton and Milford, one is for the purpose of keeping the family lot in the burying ground in Milford in good condition, one is to an adopted daughter, and the last is "to the trustees of Laurel Chapter No. 44, Order of the Eastern Star, in the City of New York." The question is whether the legacies are payable on the death of the husband or on the death of the daughter, the ambiguity arising from the sixth clause. The Probate Court ruled that they were not payable during the life of the daughter and directed the executrix "to hold the sum of $7,000 of the personal estate of the testatrix and pay the income thereof to Harriet B. Minchew during her life." Harriet B. Minchew is the daughter. Certain of the legatees named in the sixth clause appealed.

We think that the ruling was wrong. The will is obscure and we cannot be sure that the view which we take is the correct one. But it is plain that the testatrix knew how to create a life estate. She did it in the case of her husband, and if she had intended that the legacies given in the sixth clause should not be paid until after her daughter's death, if the daughter survived the husband, and that the income should be payable in the meantime to the daughter, it is difficult to understand why she should not have made that intention clear, instead of leaving it to be inferred from the vague provision in the sixth clause that if her daughter did not survive her husband then the bequests that followed should be immediately paid. *Aldrich* v. *Aldrich*, 172 Mass. 101. Again, by the fourth clause the remainder of the half of the personal property given to the husband for life is given to the daughter "absolutely . . . subject to certain other bequests hereinafter made," which are manifestly the bequests contained in the sixth clause. There is no suggestion of a life estate in the daughter also. On the contrary the gift to her is an absolute one and expressly made subject to the legacies

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thereinafter given which, in the absence of anything more, would make them payable at the husband's death. Further, in the bequest to the trustees of Laurel Chapter No. 44 the gift is to take effect if the Chapter is in existence at the death of her husband, not at the death of the daughter if she survives the husband, which would seem to indicate that the death of the husband was the *punctum temporis* as of which the legacy was to be paid. And there is a general direction that the bequests set forth in the sixth clause shall be paid from the personal property remaining at the death of the husband if sufficient, which also would seem to point to the death of the husband as the time for the payment of the legacies. Still further, one of the bequests is to the adopted daughter, who it is agreed is younger than Mrs. Minchew, and it is hardly reasonable to suppose that the testatrix intended to postpone its payment till after Mrs. Minchew's death. Lastly, we think that the language of the sixth clause may and should be construed rather as referring to the contingency on which the remainder is given by the fourth clause to the daughter, namely, "if she shall be living at the time of my husband's decease," than as manifesting an intention that the daughter should take a life estate in the remainder if she survived the husband, and that the words "then immediately upon his decease" have the same legal effect as the words "subject to" in the fourth clause.

The result is that the decree of the Probate Court should be reversed and a decree entered declaring that the legacies were payable on the death of the husband.

So ordered.

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FIRST NATIONAL BANK OF WOBURN *vs.* CITY OF WOBURN.

Middlesex. March 6, 1906. — June 18, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Land Court. Municipal Corporations. Attorney General. Way. Practice, Civil, Appeal.

Upon a petition for the registration of a title and to have the boundary of a highway determined the Land Court has jurisdiction to determine whether the public have acquired a right of way by prescription over a strip of land between a building on the petitioner's land and the highway as originally laid out.

Under R. L. c. 128, § 13, a city has the right of appeal to the Superior Court from a decree of the Land Court determining the boundary of one of its highways, upon the petition of an owner of land abutting thereon, and deciding that the public have not gained a right of way by prescription over a strip of land of the petitioner adjoining the highway. Whether the attorney general as representing the public also has the right to appeal from such a decree, *quaere*.

PETITION filed in the Land Court on May 28, 1904, by the First National Bank of Woburn as the owner of certain land with the buildings thereon bounded northwesterly by Main Street in that city, claiming title in fee simple to the middle line of that highway, to have its title registered and confirmed and to have the line of that highway determined, and also to have the line of a certain private way determined.

The city of Woburn appeared and filed an answer objecting to the establishment of the street upon the line asked for by the petitioner. The case was heard by *Jones*, J., who ruled "as a matter of law that no easement of way has been acquired by the public or the city of Woburn over a strip of land belonging to the petitioner lying between the base line of its bank building and the easterly line of Main Street as laid out; said strip of land being 60.15 feet long, 2.60 feet wide at the northerly end and 2.47 feet wide at the southerly end."

He made a decree for the petitioner; and the city of Woburn appealed to the Superior Court. Issues for trial in the Superior Court were filed and allowed in the Land Court. In the Superior Court the petitioner moved to dismiss the appeal, on the

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ground that the appeal and the issues filed with it affected the rights of the public only and not the rights of the city of Woburn in the highway, and that the city of Woburn was not entitled to represent the public in the proceeding.

The motion was heard by *Bond*, J., who allowed it, and ordered that the appeal be dismissed. The city of Woburn alleged exceptions.

The case was argued at the bar in March, 1906, before *Knowlton*, C. J., *Morton*, *Lathrop*, *Loring* & *Braley*, JJ., and afterwards was submitted on briefs to all the justices.

G. W. Norris, for the respondent.

J. W. Johnson, for the petitioner, submitted a brief.

KNOWLTON, C. J. In this case the Superior Court allowed a motion of the petitioner to dismiss the appeal, taken to that court from an order of the Land Court, upon a petition for the registration of a title. The respondent took an exception to the ruling of the Superior Court, and this presents the only question before us. The ground of the decision was that the city of Woburn had no interest which gave it a standing as a party and entitled it to prosecute an appeal. The question which arose in the Land Court was, whether the petitioner's title was good up to the line of the street as originally laid out, or whether the public had acquired a way by prescription over a strip of land, about two and one half feet wide, lying between the easterly line of Main Street as laid out and the base line of the bank building standing on the petitioner's lot.

A fundamental inquiry is whether the Land Court, in a proceeding of this kind, has a right to determine such a question. We have no doubt that it has this right. An application for the registration of a title is, by the terms of the statute, a proceeding *in rem*, which operates directly to vest and establish title to the land. R. L. c. 128, § 1. The statute contains elaborate provisions for the determination of rights claimed in the land, which shall be binding upon all the world. R. L. c. 128, §§ 37, 38. It requires not only special notice to all persons known to be interested, but general notice "to all whom it may concern." R. L. c. 128, §§ 30, 31. The certificate is made conclusive as to all incumbrances, with certain exceptions mentioned in § 38. This itself implies that the court is to pass upon the validity of

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incumbrances before issuing a certificate. There is a special provision for the determination of the boundaries of highways. R. L. c. 128, §§ 31, 38, cl. 3. In this case the application contains a request to have the boundary of the way determined. The court, therefore, had jurisdiction of this part of the case.

The right of travellers to use the way is a public easement, and the right by prescription, claimed in the narrow strip between the located line of the street and the base line of the building, is of the same kind. Ordinarily, rights of the general public are represented in court by the attorney general, and under this statute he may not only appear under the general description of parties in the notice "to all whom it may concern," (see § 33) but he must be given special notice "if the land borders on a river, navigable stream or shore, or on an arm of the sea where a river or harbor line has been established, or on a great pond, or if it otherwise appears from the application or the proceedings that the Commonwealth may have a claim adverse to that of the applicant." § 31. In like manner, if the applicant requests to have the line of a public way determined, notice must be given to the mayor of the city or to one of the selectmen of the town or towns in which the land lies, or if the way is a highway, to one of the county commissioners of the county or counties in which the land lies. § 31.

In a case like the present the statute expressly recognizes the mayor of the city as the person to whom notice must be sent specially by registered letter. This notice is given him in his official capacity, as a representative of the city, and the provision is a statutory recognition of the rights of cities and towns to be heard upon questions affecting the boundaries of public ways. If a city must be given notice, and an opportunity to be heard, in such a case, it has a right of appeal to the Superior Court under § 13.

There are good reasons for giving cities and towns a right to to be heard when the boundaries of ways are to be determined. While they have no title to the land in public ways, by virtue of the laying out of the ways they have an interest in them and in the public easement which subjects the land to use for the construction and repair of the ways as well as for travel over them. They are bound by law to keep them safe and convenient for

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travellers. It is important that they should know the true boundaries of ways, whether they are laid out by the public authorities or acquired by prescription. The extent of a way is important as bearing upon the duty of the city or town to keep it in repair, and its liability to travellers who are injured while passing over it. R. L. c. 51, §§ 1, 17, 18. *Gordon* v. *Taunton*, 126 Mass. 349. *Bassett* v. *Harwich*, 180 Mass. 585.

Whether the attorney general, as a representative of the public, had also a right to be heard, it is unnecessary to decide. In *McQuesten* v. *Attorney General*, 187 Mass. 185, the attorney general represented public rights, and the town was also a party claiming municipal rights.

We are of opinion that the appeal was wrongly dismissed.

Exceptions sustained.

ARTHUR KOPPEL *vs.* MASSACHUSETTS BRICK COMPANY.

Franklin. May 16, 1906. — June 18, 1906.

Present: KNOWLTON, C. J., LATHROP, HAMMOND, LORING, & BRALEY, JJ.

Practice, Civil, Agreed statement of facts. *Corporation. Sale. Evidence.*

When a case is submitted upon an agreed statement of facts, the decision is to be made upon the facts actually stated unless there is a stipulation that inferences from the facts stated may be drawn.

A corporation cannot ratify a contract made when it was not in existence by one who assumed to act in its behalf, although it may make a new contract on the same terms.

If one sells goods to a certain person, and afterwards a corporation is created and the goods come into the possession of the corporation "by a transfer from" the person who bought them, this has no tendency to connect the corporation with the original sale.

CONTRACT for $2,728.55. Writ dated June 28, 1902.

In the Superior Court the case was submitted upon an agreed statement of facts to *Pierce*, J., who found for the plaintiff in the sum of $200.79. The plaintiff appealed.

The agreed statement of facts was as follows and no more:

"It is agreed that the charter of the defendant corporation was issued on March 19th, 1902; that a certificate under Revised Laws

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Chapter 110, Sections 43 and 44, was issued on April 12th, 1902; that on December 30th, 1901, the items in the bill of particulars numbered 1 to 6 inclusive were ordered by P. F. Welch and were charged to him by the plaintiff, but were shipped on the dates set opposite each item; that after incorporation the property came into the possession of the defendant by a transfer from Welch; that Welch, upon the incorporation of the defendant, was elected its treasurer; that after the incorporation, Welch ordered of the plaintiff for the use and with the knowledge of and in the name of the defendant the items numbered 7 to 12 inclusive; that they were billed to P. F. Welch; that on December 5th, 1902, the plaintiff executed to Welch a release under seal of all demands without prejudice to his claim against the Massachusetts Brick Company, in consideration of the payment by him of one thousand dollars; that the plaintiff had no claim on Welch other than for the sale of the articles set out in this declaration and a claim for all of the items was made upon Welch, and a writ was brought against Welch for the same prior to the time of the execution of the release."

D. Malone, for the plaintiff.

J. E. Crowley, for the defendant.

KNOWLTON, C. J. This is an appeal by the plaintiff from a judgment of the Superior Court upon an agreed statement of facts, for a sum less than that claimed by him in his declaration. The defendant did not appeal, but says in its brief that "There is no error of law shown by the record." We therefore have no occasion to consider the last part of the account, on which the finding was for the plaintiff.

Upon a submission of an action on an agreed statement of facts, the decision is to be made upon the facts actually stated. In the absence of a stipulation that inferences may be drawn from the facts stated, the question is whether the matters agreed upon establish the plaintiff's case. Neither the Superior Court nor this court can draw inferences of fact either for or against the plaintiff. *Schwarz* v. *Boston*, 151 Mass. 226. *Mayhew* v. *Durfee*, 138 Mass. 584.

In this case the disputed items of the account are for articles ordered by one Welch and charged to him by the plaintiff. Afterwards an action was brought against Welch by the plain-

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tiff, to recover the price of them, and on his payment of $1,000 to the plaintiff, a settlement was made and Welch was given a release of all demands, without prejudice to the plaintiff's claim against this defendant. The defendant corporation was not in existence when the order for these articles was given, nor for nearly three months afterwards, and it was not authorized to do business under the R. L. c. 110, §§ 43, 44, until the expiration of nearly a month after its certificate of incorporation was issued, and more than two weeks after the last of the articles had been delivered to Welch.

Even if Welch had assumed to act for a corporation which was then expected to be formed, which does not appear in the statement of facts, and if the corporation had attempted to ratify his act as its agent, it could not have made the original contract binding upon it without introducing into the transaction such elements as would be a sufficient foundation for a new contract. *Penn Match Co.* v. *Hapgood*, 141 Mass. 145. *Abbott* v. *Hapgood*, 150 Mass. 248, 252. *Holyoke Envelope Co.* v. *United States Envelope Co.* 182 Mass. 171. *Pennell* v. *Lothrop*, 191 Mass. 357.

In this case nothing is stated which has any tendency to connect the defendant with the sale of these goods by the plaintiff. We have only the fact "that after incorporation the property came into the possession of the defendant by a transfer from Welch"; which, so far as it shows anything, indicates a sale by Welch to the defendant.

Judgment affirmed.

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JONATHAN CLARK & another *vs.* LOTTIE S. BAKER.

Middlesex. March 9, 1906. — June 19, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Practice, Civil, Auditor, View, Claim for trial by jury.

Where an auditor reports to the court that in his opinion a view should be taken by him before he hears the evidence, the judge, if he is of the opinion that a view will tend to a better understanding of the case, in his discretion may authorize the auditor to take the view.

Where a plaintiff has claimed a trial by jury and the defendant has not, and after the filing of an auditor's report the plaintiff waives a trial by jury, and the defendant six weeks later when the case is about to be reached for trial files a motion to restore it to the jury list and a motion to be allowed to file a claim for a trial by jury, if the judge is of opinion that the action of the defendant is taken for the purpose of delaying and obstructing the plaintiff in the prosecution of his claim, it is proper for the judge in the exercise of his discretion to deny the motions.

Under R. L. c. 173, § 54, a defendant who has been defaulted and wishes to have the damages assessed by a jury must make a motion to that effect after the default.

CONTRACT on an agreement in writing by which the plaintiffs agreed to build a house for the defendant, the completion of which was alleged to have been prevented by the wrongful acts of the defendant. Writ dated April 27, 1900.

In the Superior Court the case was referred to George L. Huntress, Esquire, as auditor. His preliminary report referred to in the beginning of the opinion was as follows:

"This is an action upon a building contract for the erection of a dwelling-house for the defendant.

"One of the main issues involved is, whether or not the said dwelling-house was constructed of proper materials and in a workmanlike manner.

"The plaintiffs request a view of the premises and at the present time. The defendant objects to a view, and particularly objects to a view until the conclusion of the evidence.

"In my opinion a view is necessary to a just decision of the case. I am furthermore of the opinion that the view should be taken before the evidence as to improper construction and workmanship is introduced.

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"Having doubts as to my power to take a view against the objection of the defendant, I report the question to the court for instructions."

Fessenden, J. made an order giving the auditor authority to take the view, and the defendant appealed.

The proceedings relating to motions of the defendant to restore the case to the jury list and to be allowed to file a claim for a trial by jury are described in the opinion. The motions were denied by *Fessenden*, J., and the defendant appealed. These motions were made and denied on November 14, 1905. On November 20, the defendant was defaulted. The judge found for the plaintiffs in the sum of $5,667.41 and judgment was entered for $5,695.75 damages and costs. The defendant appealed. On January 30, 1906, the plaintiffs moved to dismiss the appeal for want of prosecution. The motion was allowed unless the papers were printed and entered in the clerk's office of this court on or before February 10, which was done.

W. H. Baker & J. G. Wright, for the defendant, submitted a brief.

E. R. Thayer, (*C. Hunneman* with him,) for the plaintiffs.

MORTON, J. This case comes here on appeal by the defendant from a ruling in the Superior Court allowing the auditor, on motion of the plaintiffs, to take a view, after he had reported to the court that in his opinion a view was necessary to a just decision of the case, and that it should be taken before the evidence was introduced, and also on appeals from rulings denying her motion that the case should be restored to the jury list after it had been stricken therefrom in consequence of a waiver by the plaintiffs of their claim for a trial by jury, and denying another motion that she should be allowed to file a claim for a jury trial.

We have no doubt of the power of a judge to take a view, and in a proper case to authorize an auditor to do so. Generally cases are to be heard and determined upon the evidence submitted in open court. But where the judge is of opinion that a view will tend to a better understanding and more satisfactory disposition of the case he may in his discretion authorize one to be taken. See *Commonwealth* v. *Chance*, 174 Mass. 245; *Tully* v. *Fitchburg Railroad*, 134 Mass. 499, 503.

The case was entered in June, 1900, and the plaintiffs duly

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filed a claim for a trial by jury. An auditor was appointed and his report was filed on September 30, 1905. On October 4, the plaintiffs filed a waiver of a jury trial. On November 14, apparently just as the case was about to be reached for trial, the defendant filed the two motions referred to above. The grounds on which the judge overruled them do not appear, and nothing is before us except what the record discloses. It is possible that the judge may have been of the opinion that the only satisfactory explanation of the defendant's conduct in not claiming a jury trial when the action was entered, and in delaying from October 4 to November 14 to file her motions was that she had no intention of claiming a jury trial originally, and that her purpose was to delay and obstruct the plaintiffs in the prosecution of their claim. If so, the judge was justified in the exercise of his discretion in denying the motions, and the question which the defendant seeks to raise as to the effect of a withdrawal by the party making it of a claim to a jury trial on which the other party has relied does not arise. *Stevens* v. *McDonald*, 173 Mass. 382. Further it is to be noted that the defendant was defaulted and the case was heard by the judge only on the question of the assessment of the damages. If the defendant had wished to have the damages assessed by a jury it was necessary to make a motion specifically addressed to the assessment of damages after the default. *Gallagher* v. *Silberstein*, 182 Mass. 20. Not having done so, she has no just ground of complaint at having her motions denied.

Judgment affirmed.

ANN GIBNEY *vs.* EDWARD W. EVERSON & another.

Norfolk. March 9, 1906. — June 19, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Negligence. Metropolitan Sewerage Commissioners. Practice, Civil, Exceptions.

In an action against a contractor employed by the metropolitan sewerage commissioners for injury to property by the negligent and unskilful acts of persons employed by him in constructing a sewer, it is no defence that on a certain day the defendant sublet the contract to an independent contractor, if under the

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terms of his contract he had no right to sublet it, and if there is evidence that the contract of subletting was not genuine and the jury find this to have been the case, and if also the work was carried on by the defendant himself for about two months before the alleged subletting and the defendant makes no request that the jury shall separate the damages up to and after that date.

If no action can be maintained against the metropolitan sewerage commissioners for injury to property by the negligent and unskilful acts of persons employed by them in the work of constructing a sewer, which in this case there was no occasion to consider, this does not help a contractor employed by the commissioners when sued for injury to property caused by such acts on the part of himself or his servants.

No exception lies to the entire charge of a judge.

TORT in three counts which are described in the first paragraph of the opinion. Writ dated February 24, 1902.

In the Superior Court the case was tried before *Schofield*, J. The defences relied upon by the defendants are stated in the opinion. At the close of the evidence the defendants asked the judge to make the following rulings:

First. The defendants having made a written contract with Upper to do the work, and placing Upper in the responsible charge of the work and workmen, are not liable for any injury suffered by the plaintiff caused by the negligence of Upper's servants, if there was such negligence.

Second. That under the contract between the defendants and Upper, Upper had control of all blasting and explosions, and the defendants had no control over such blasting and explosions, and the defendants cannot be held liable for any negligence of Upper.

Third. If the work contemplated under the contracts could have been done in such a manner as not to injure the property of the plaintiff, the negligence of the sub-contractor, Upper, cannot be imputed to the defendants.

Fourth. All the work done by the defendants was done under the license conferred by St. 1889, c. 439, St. 1895, c. 406, and St. 1899, c. 424.

Fifth. The work done by the defendants was done under and by virtue of a contract with the State, acting by the metropolitan sewerage commission, and all the work was necessary, contemplated and called for by that contract. The work was done under a contract with the State, and the defendants cannot be held liable, as a matter of law, for doing the acts

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necessarily contemplated and called for by such license and contract.

Sixth. Upon all the evidence the plaintiff cannot maintain this action.

The judge refused to rule as requested and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of $250. The defendants alleged exceptions. The bill of exceptions, after stating the refusal of the rulings requested and printing the charge of the judge, stated that the defendants excepted to "the refusal to make the foregoing rulings," to "the foregoing instructions to the jury," and to "the submission of the case to the jury."

J. W. Keith, for the defendants.

I. C. Hersey, (*T. E. Grover* with him,) for the plaintiff.

LATHROP, J. This is an action of tort in three counts. The first count is for negligently and unskilfully blasting in the work of constructing a sewer in the town of Hyde Park, whereby injury was done to the cellar walls of the plaintiff's house in that town. The second count alleges that the defendants in connection with the work of constructing the sewer had a stationary engine and boiler near the plaintiff's house, and that the same had been so unskilfully operated that dense clouds of black smoke and cinders and large quantities of dust had come therefrom, thereby discoloring and disfiguring the house. The third count was for negligently diverting the rainwater by deposits of gravel and other material, and by pumping water so that it flooded the cellar of the plaintiff's house.

At the trial in the Superior Court the plaintiff put in evidence tending to show the injury done to her house according to the declaration.

The principal defence was that the defendants had sublet the contract to one Upper on June 11, 1900; that he was an independent contractor; and that therefore they were not liable. By the defendants' contract with the metropolitan sewerage commissioners the defendants had no right to sublet their contract. Apart from this there was evidence that the contract with Upper was not a genuine contract, and this question was submitted to the jury. Again, it appeared that the defendants began work in April, 1900, and they did not deny that they continued it until

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June 11, 1900; and there was no request that the jury should separate the damages up to and after that date.

Another contention is that the board of sewerage commissioners could not be sued; but this is of no consequence in this case, and we need not consider it.

The only exceptions taken were to the refusal of the judge to give certain instructions requested, and to the instructions given. The entire charge appears to be reported. It is unnecessary to cite authorities in support of the proposition that an exception does not lie to an entire charge. The defendants have not pointed out in their brief any particular request which should have been given, but have argued the case generally.

We do not feel called upon to go over these requests in detail. It is enough to say that on the questions argued, we see no ground of exception.

Exceptions overruled.

JAMES A. ROCHFORD *vs.* THOMAS J. ROCHFORD & others.

Middlesex. March 13, 1906. — June 19, 1906.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Mechanic's Lien. Practice, Civil, Verdict.

If, at the trial of a petition to establish a mechanic's lien, issues are framed for the jury and the answers of the jury to certain of the issues are agreed upon by the parties, and if among those agreed upon is the issue "What amount, if anything, is due the petitioner for labor performed and materials furnished on the house on said premises under said contract," and the answer is "$917.46," this disposes of an objection by the respondent that the petitioner abandoned his contract, and if there is no other objection warrants a decree for the petitioner.

MORTON, J. This is a petition to enforce a mechanic's lien for labor and materials under an entire contract. Issues were framed for a jury and the case was then sent to an auditor. After the auditor reported, the case was submitted to a jury upon the issues which had been framed. By direction of the judge the jury answered the first issue in the negative which

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was in the petitioner's favor. No question is raised, however, as to the correctness of that ruling. The parties agreed upon the answers to all the remaining issues, except nine and ten, the last two, and the case went to the jury on those two issues both of which were answered in the negative and in the petitioner's favor. As a result of the trial a decree was entered in favor of the petitioner. Exceptions were taken by the respondents Atkins and Clark which were sustained. See *Rochford* v. *Rochford*, 188 Mass. 108, which it is agreed in the exceptions may be referred to, and where the issues that were framed appear. The case went back to the Superior Court and that court "on consideration of the findings of the jury, the facts as reported by the auditor so far as applicable to the issues raised by the pleadings which are not technically covered by the findings of the jury, neither party offering any other evidence" entered a decree establishing the lien, subject to the mortgage, for the amount for which it had been previously established. The respondents Atkins and Clark objected to the entry of the decree, and contended that the petitioner had abandoned his contract, but the judge ruled that on the face of the record a decree could be entered for the petitioner and entered the above decree. The case is here on exceptions by the respondents Atkins and Clark to the entry of this decree.

The respondents contend that the contract was abandoned by the petitioner. This is their only contention. If the petitioner wilfully abandoned his contract and broke it without any excuse he is not entitled to recover and cannot maintain his petition. *General Fire Extinguisher Co.* v. *Chaplin*, 183 Mass. 375. But no issue was submitted to the jury on this point and it appears that the parties agreed to the answers by the jury to all of the issues except the first and ninth and tenth. The fifth issue was, "What amount, if anything, is due the petitioner for labor performed and materials furnished on the house on said premises under said contract?", and the answer was $917.46. This answer was inconsistent with an abandonment of the contract. And even if the question of abandonment was properly raised and the auditor's report contained evidence in relation to it, it cannot be said in view of the answer of the jury to the fifth issue that the decree in favor of the petitioner was unwarranted, and that the ruling

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of the judge, that on the face of the record he could give the petitioner a decree, was wrong.

Exceptions overruled.

B. E. Kemp, for the respondents Atkins and Clark.

D. Benshimol, for the petitioner, was not called upon.

JOHN J. CADIGAN *vs.* LOTTA M. CRABTREE.

Suffolk. March 16, 19, 1906. — June 19, 1906.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Agency, Commission. *Broker*. *Practice, Civil*, Verdict, Concessions in argument before full court. *Evidence*, Admissions.

In an action by a real estate broker for a commission for procuring a tenant for a certain building of the defendant, the plaintiff testified that he received an offer to take a lease of the property on certain terms and went to see the defendant and reported the terms to her, that she said she would not do anything about it just then, that she was going away, but that she should like to sell the property for a price which she named, and said "You see if you can get me a customer," whereupon the plaintiff said "If you change your mind about renting it, let me know." The defendant denied that any offer to take a lease was communicated to her, and testified that she wrote to her agent to "take the sign down," as she had made up her mind to sell the property, and told the plaintiff at once that she would do nothing with her property, and that she was disgusted with the whole business and was tired out and was going off to rest in New York. Later the defendant leased the property to the tenant from whom the plaintiff testified that he procured the offer on terms which the plaintiff contended were in substance those procured by him. The presiding justice refused to instruct the jury that the plaintiff's authority to procure a tenant for the defendant's property was terminated or revoked at this interview between the plaintiff and the defendant before the lease was made. *Held*, that, apart from the question whether the revocation of authority was in good faith, the instruction that there was a revocation in fact should have been given.

The effect of a verdict for a defendant on a special count, ordered by the presiding justice at a previous trial, on the right of the plaintiff at a new trial to go to the jury on a count on an account annexed involving directly or indirectly the same issues was here referred to by LORING, J. although not passed upon by the court.

Discussion by LORING, J. of the question at what point negotiations conducted by a real estate broker employed by a landowner have progressed so far that a revocation of the broker's authority would be in fraud of his rights.

A concession made by a counsel in his client's presence in conducting an argument before the full court in answer to a question of one of the justices as to his contention is regarded as made for the purposes of that hearing and cannot be introduced in evidence at a new trial of the case as an admission in behalf of his client.

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CONTRACT to recover a commission for services as a real estate broker. Writ in the Supreme Judicial Court dated July 29, 1899.

At the first trial of the case before *Morton*, J., the declaration as amended contained six counts. The first and second counts were stricken out with the consent of the plaintiff's counsel. The justice ordered a verdict for the defendant on the fifth and sixth counts, and submitted the case to the jury on the third and fourth counts, but gave instructions which were in effect a ruling that the plaintiff had not made out the case set forth in his third count. The third count was to recover a commission of $2,750 for procuring a tenant for the Hotel Reynolds in Boston belonging to the defendant at an agreed rental, the defendant having refused to carry out her agreement. The fourth count was upon an account annexed for the same amount of money as a commission on a lease of the property with interest from January 1, 1898. The jury returned a verdict for the plaintiff in the sum of $2,847.38. Exceptions alleged by the defendant were sustained by this court in a decision reported in 179 Mass. 474.

There was a second trial before *Loring*, J. The jury, by direction of the justice, returned a verdict for the defendant on the third count, and on the fourth count returned a verdict for the plaintiff, in the sum of $3,257.37. Exceptions alleged by the defendant were sustained by this court in a decision reported in 186 Mass. 7, on the ground that upon all the evidence, as presented at that trial, the jury were not warranted in returning a verdict for the plaintiff on the fourth count.

There was a third trial before *Knowlton*, C. J. Before this trial the plaintiff amended his declaration by adding a seventh count, which was on an account annexed for $2,750, and was exactly like the fourth count as it then stood, except that interest was claimed from March 16, 1899, instead of from January 1, 1898. The case was submitted to the jury on this count, and the jury disagreed.

There was a fourth trial before *Barker*, J. At this trial the plaintiff amended the fourth count of the declaration by striking out the account annexed to that count, and inserting in place thereof the following:

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"Boston, July 29, 1899.

"Lotta M. Crabtree,

"To John J. Cadigan, Dr.

"(1)	To commission upon procuring a person or persons ready to take a lease of the Hotel Reynolds property as requested by defendant, 1 % of total rental $295,000. (This includes total rental to end of renewal term.)	$2,950 00
"(2)	Interest on $2950.00 from Jan. 2, 1899, to July 29, 1899	102 25
		$3,052 25"

At the close of the evidence the justice directed the jury to return a verdict for the defendant on the fourth count as amended.

Before the submission of the case to the jury upon the seventh count, and with the understanding that the case, if submitted, was to be submitted to the jury upon that count, the defendant asked the justice to make certain rulings as follows:

"Seventh. The plaintiff cannot recover in this action except upon the ground that he was the procuring or predominating efficient cause of the lease given by the defendant to Gould and Pollo; that he was the active and efficient cause of securing the letting of the Hotel Reynolds to Gould and Pollo, that his work was the efficient cause of the making of the Gould and Pollo lease."

The justice gave this ruling.

"Eighth. Upon all the evidence, the jury would not be warranted in returning a verdict for the plaintiff upon the ground that he was the predominating efficient cause of the lease given by the defendant to Gould and Pollo and that his services brought about the making of that lease."

The justice refused to give this ruling.

"Ninth. The terms of the Mann lease, so called, are not substantially the same as the terms of the lease given by the defendant to Gould and Pollo."

The justice gave this ruling, and subsequently instructed the

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jury as follows: "I will say, Mr. Foreman and gentlemen, in reference to what has been called the Mann lease, and the Gould and Pollo lease, as to the similarity of their terms, that they are not substantially the same. The terms of the Mann lease are not, for the purposes of this case, substantially the same as the terms of the lease with Gould and Pollo. I do not consider that it is of crucial importance in this case, because I have said to you that the principal question is, take the Gould and Pollo lease as it was made, has the plaintiff satisfied you by a fair preponderance of the evidence that he was the efficient, predominating cause of the making of that lease as it is."

"Eleventh. Upon all the evidence, the jury would not be warranted in returning a verdict for the plaintiff upon any ground whatsoever, and, as matter of law, and upon all the evidence, the jury is bound to return a verdict for the defendant."

The justice refused to give this ruling.

The defendant asked the justice to order a verdict for the defendant upon the seventh count of the declaration. The justice refused to do this.

Before the charge to the jury, the defendant presented the following requests for instructions, all of which the justice refused to give:

"8. Upon the evidence, you would not be warranted in finding that the employment or authority of the plaintiff to attempt to procure a tenant for the defendant's property was not terminated or revoked by the defendant, on or about January 2, 1899, by what took place at the Adams House interview, between the plaintiff and the defendant.

"9. Upon the evidence, the plaintiff's employment or authority to attempt to procure a tenant for the defendant's property was terminated or revoked by what took place at the Adams House interview, between the plaintiff and the defendant, on or about January 2, 1899.

"10. Upon all the evidence, you would not be warranted in finding that the employment or authority of the plaintiff to attempt to procure a tenant for the defendant's property was not terminated or revoked by the defendant on or about January 2, 1899, or at some time before she finally determined to let the property to Gould and Pollo, and that she was not at the

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time acting in good faith; therefore you must return a verdict for the defendant."

"13. Upon the evidence, you would not be warranted in finding that the defendant was acting in bad faith at her interview with him at the Adams House on or about January 2, 1899, or whenever she terminated or revoked his employment or authority to attempt to procure a tenant for her property.

"14. There is no evidence to warrant a finding that the defendant was acting in bad faith at her interview with him at the Adams House on or about January 2, 1899, or whenever she terminated or revoked his employment or authority to attempt to procure a tenant for her property."

"21. Upon all the evidence in the case, you would not be warranted in finding that the plaintiff was the active, efficient, procuring cause of the Gould and Pollo lease.

"22. Upon all the evidence in the case, you would not be warranted in returning a verdict for the plaintiff.

"23. Upon all the evidence in the case, the plaintiff cannot maintain this action, and your verdict must be for the defendant."

The substance of the Adams House interview above referred to is described in the opinion.

The case was submitted to the jury upon the seventh count, under which the plaintiff contended that he was entitled to a commission upon the lease which actually was given by the defendant to Gould and Pollo.

A portion of the charge of the justice upon the question whether the plaintiff had been discharged by the defendant in good faith before the lease to Gould and Pollo was made is quoted in the opinion.

The jury returned a verdict for the defendant upon the amended fourth count of the declaration in accordance with the instruction of the justice, and returned a verdict for the plaintiff upon the seventh count in the sum of $3,768.37. The defendant alleged exceptions, which after the death of *Barker*, J. were allowed under R. L. c. 173, § 108, by *Braley*, J.

F. Paul, for the defendant.

T. W. Proctor & W. R. Sears, for the plaintiff.

LORING, J. We are of opinion that the exceptions to the

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refusal to give rulings asked for by the defendant and marked 8 and 9 must be sustained.

The testimony of the plaintiff and the defendant as to what took place at the interview between them on or about January 2, 1899, was conflicting. But whichever of the two stories was believed, the plaintiff's authority to get a tenant for the property was revoked in fact at that time (if it had not been revoked before by the defendant's instructions as to the taking down of the plaintiff's sign), and the jury should have been so instructed.

The plaintiff's story is that on or about December 24, 1898, Gould and Pollo made a definite offer to take a lease on the terms of the Mann lease, which he, the plaintiff, reported to the defendant's agent Gilman; that Gilman said he could get no answer from the defendant and added: "She is at the Adams House, why don't you go up to see her?" that he did go up on January 2, and that at that interview the defendant said "she would not do anything about it just then; that she was going away, but that she would like to sell the property, and would sell it for $1,100,000, 'And you see if you can get me a customer.' I said, 'If you change your mind about renting it, let me know'; she said she would."

The defendant denied that any such offer from Gould and Pollo was ever communicated to her, and testified that on December 29 she wrote to Gilman to "take the sign down," as she had made up her mind to sell the property if it took a year or even more than a year to do it; and that on January 2, she saw the plaintiff near the elevator and "told him at once I would do nothing whatever with my property; that my mother and myself were disgusted with the whole business; that we were tired out and were going off to rest in New York."

The refusal to give these rulings cannot be supported on the ground that a revocation of authority in fraud of the plaintiff's rights is not in law a revocation.

This is not the accurate meaning of these two requests for rulings, and it is plain that they were not understood at the trial to have that meaning.

It is plain that the defendant did not so understand them. The only difference between the requests marked 8 and 9 on the

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one hand and the request marked 10 on the other hand is that in the request marked 10 the defendant asked for a ruling in case the defendant was not acting in good faith when she revoked the plaintiff's authority.

The presiding justice evidently did not so understand these requests. He told the jury that they could find for the plaintiff if they found that the plaintiff had not in fact been discharged, or if they found that he had been discharged in fact, but that that discharge was made in bad faith. His exact words were: "The plaintiff says in the first place that he was the efficient, predominating cause of the making of that lease. He also says that he was in the employment of the defendant as broker up to the time when that lease was made. He further says that if you find that he had been discharged from his employment as broker by her before that lease was made, that the discharge was made in bad faith, and that he has a right, although so discharged, — a right to be in a position of being employed by her up to that time. You can take up those questions in any order you see fit."

And finally, it is manifest that the plaintiff's counsel did not so understand them, at least when they made their brief in the case now before us. On the first page of their brief the plaintiff's counsel say: "The plaintiff contended that he was the efficient, predominating cause of the lease, that either the defendant had not terminated his employment before the agreement for the lease was really made or if the plaintiff's employment had before then been terminated by the defendant, such termination was by the bad faith of the defendant."

Under the instructions given to them, the jury may have found for the plaintiff on the ground that, independently of the question of bad faith, the plaintiff's authority to get a tenant for the hotel was not revoked before the lease made to Gould and Pollo in March, 1899.

As the exceptions to the refusal to give the rulings marked 8 and 9 asked for by the defendant must be sustained, it is not necessary to consider a question which arises in connection with the exceptions to the refusal to the rulings marked Eleventh, 13, 14, 22 and 23. The question is whether (so long as the verdicts stand which were ordered for the defendant on the third count at the second trial and on the fourth count at the fourth

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trial) the following issue of fact (so far as this case is concerned) is not concluded against the plaintiff, namely: "That Gould and Pollo did not offer before January 2, 1899, to take a lease on the terms stated in the lease to Mann." It is manifest that the question whether the revocation of the plaintiff's authority on January 2, 1899, was made in bad faith depends upon how far negotiations by the plaintiff on behalf of the defendant had then progressed, if such negotiations with them had then been carried on by the defendant's request (express or implied) after the Mann lease fell through.

Neither is it essential to consider whether it was necessary for the plaintiff to show that he was the efficient cause of the lease to Gould and Pollo made in March, in addition to showing that the plaintiff's negotiations with them had progressed so far on the date when the defendant revoked the plaintiff's authority as to make that revocation a fraud on the plaintiff. It perhaps might be assumed that a broker's authority is revoked in bad faith where negotiations had been carried on by a broker for his principal and had progressed so far at the time when the broker's authority was revoked that he was found to be the efficient cause in fact of a trade subsequently struck between the principal and the customer. In such a case it would seem that the finding that the broker was the efficient cause of the trade made includes a finding that the revocation was in fraud of his rights. But it does not follow that a revocation of authority may not be in fraud of the broker's rights when it could not be found that his acts before the revocation were the efficient cause of the subsequent trade. It seems to have been assumed at the trial that the plaintiff had to make out in proof two propositions, first, that he was the efficient cause of the contract subsequently made, and second, that the revocation of his authority was in fraud of the broker's rights. But, as we have said, it is not necessary to consider those questions now.

The question of efficient cause is ordinarily at least a question of fact for the jury where no exclusive agency has been given and where two brokers have worked on the case, as in *Crowninshield* v. *Foster*, 169 Mass. 287. It is in that class of cases that ordinarily at least the substantial identity of the offer not accepted and the trade made is material.

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There is one question of evidence which may arise again. The defendant's counsel asked the plaintiff on cross-examination whether at the argument before the full court in *Cadigan* v. *Crabtree*, 186 Mass. 7, the Chief Justice did not ask the plaintiff's counsel in his (the plaintiff's) presence, "if he contended that Miss Crabtree was acting in bad faith when she said what she testified to in January, 1899." This was excluded on the ground that the question asked by the Chief Justice was asked as to the contention of the plaintiff's counsel for the purpose of that hearing, and that if the plaintiff's counsel answered that question in the negative it did not preclude the plaintiff from contending at the trial in question that there was in fact bad faith on the defendant's part in revoking the plaintiff's authority. We are of opinion that the ruling was correct.

Exceptions sustained.

JOHN McMAHON *vs.* ROSINA B. MILLER & another, executors.

Norfolk. March 20, 1906. — June 19, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, BRALEY, & SHELDON, JJ.

Limitations, Statute of. Equity Jurisdiction. Executor and Administrator.

In a suit in equity against executors under R. L. c. 141, § 10, by a creditor of the estate of the testator, whose claim had not been prosecuted within the two years prescribed by § 9 of the same chapter, it appeared that the debt was created by the plaintiff, after the testator's death, taking up certain notes which he had indorsed for the testator's accommodation, that in taking up the notes he got the bank holding them to discount his personal note for the amount due and gave to the bank as security the notes of the testator which he took up, that the personal property of the testator's estate was not sufficient to pay the debts, and one of the executors represented to the plaintiff that if a sale of the real estate was forced there might not be enough to pay the debts and that if a sale was not forced and the proceeds were sufficient the plaintiff's debt would be paid, that he urged the plaintiff not to bring an action and to persuade the bank not to sue on the testator's notes held by it as security, that the plaintiff forbore to bring action and persuaded the bank also to forbear, that before the two years of limitation expired the executors under a license from the Probate Court sold a part of the real estate and realized a substantial sum of money, more than sufficient to pay all the debts of the estate, that the plaintiff was not informed of this sale and did not learn of it until after the two years of limitation had expired. It further appeared that the executors acted in good faith, and that the plaintiff and the executors mutually were mistaken in believing that by bringing an action a sale

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of the land could be forced and in believing that the money due to the plaintiff could be paid at any time whether the action was brought within the two years or not. The presiding justice found that the plaintiff was not chargeable with culpable neglect. *Held*, that, even if the parties acted under a mistake of law which affected the conduct of the plaintiff, justice and equity required that the debt to the plaintiff should be paid, and that under the statute he was entitled to a judgment for the amount of his claim.

MORTON, J. This is a bill in equity for relief under R. L. c. 141, § 10. The presiding justice ruled on the facts found by him, that the plaintiff had not been guilty of culpable negligence, but ruled that there was a mutual mistake of law on the part of the plaintiff and the defendants, and that the plaintiff was not entitled to relief under R. L. c. 141, § 10, as interpreted by *Powow River National Bank* v. *Abbott*, 179 Mass. 336, and dismissed the bill with costs. The plaintiff appealed.

We think that the decree dismissing the bill was wrong, and that the plaintiff is entitled to the relief which he seeks. We treat what is called a ruling as in effect a finding that the plaintiff was not chargeable with culpable neglect, which are the words of the statute, and as intended to express the conclusion to which the presiding justice came on that question on the evidence before him, and the facts as found by him. That finding distinguishes this case from most if not all of the previous cases which have arisen under this statute. In those cases it was found or ruled that the plaintiff was guilty of culpable neglect. That was evidently the ground on which the case of the *Powow River National Bank* v. *Abbott* was decided as shown by the cases cited in the first paragraph of the opinion and by the reasoning of the court. It is plain, we think, that justice and equity require that the plaintiff should have the relief which he seeks. "The statute is remedial. . . . Its operation is not limited to cases where the failure to sue seasonably was due to such fraud, accident or mistake as would be a ground for equitable relief if there were no statute." *Ewing* v. *King*, 169 Mass. 97, 102. The plaintiff indorsed, for the accommodation of the defendants' testator, notes, the renewals of which came due after the testator's death, and which the plaintiff was obliged to take up, and on which there is a balance now due him of upwards of $1,700. In taking up the notes the plaintiff got the bank holding them to discount his personal note for the amount due, and gave to the

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banks as collateral therefor the notes of the testator which he took up. The personal property belonging to the estate was not sufficient to pay the debts, but there was real estate available for that purpose. The defendant Widger, with the knowledge of his co-executor, represented to the plaintiff that if a sale of the real estate were forced there might not be enough to pay the debts, and that if the sale was not forced and the proceeds were sufficient the plaintiff's debt would be paid out of them. He urged the plaintiff not to bring suit and to persuade the bank which held the testator's original notes not to do so. The plaintiff, who had been a warm personal and business friend of the testator, forbore to bring suit, and persuaded the bank also to forbear. Subsequently and before the two years expired the defendants, acting under a license from the Probate Court, sold a part of the real estate and realized therefrom $6,000. The plaintiff was not informed of this sale, and the defendants left him in ignorance of it, and he did not learn of it till after the two years had expired. The finding that the plaintiff was not "guilty of culpable negligence" must be taken to include, we think, a finding that there was no negligence on his part in failing to ascertain the facts with regard to the sale of the real estate. The fact that after the representations made by them the real estate was sold by the executors before the two years expired and that the sale was not made known to the plaintiff and he did not learn of it till after the two years expired, also distinguishes this case from the *Powow River National Bank* v. *Abbott*, *ubi supra*, and the cases referred to in the opinion in that case, and renders it more analogous to *Ewing* v. *King*, *ubi supra*, *Morey* v. *American Loan & Trust Co.* 149 Mass. 253, and *Knight* v. *Cunningham*, 160 Mass. 580. The fact that the executors acted in good faith, as it is found that they did, and the further fact, which also is found, that they and the plaintiff were mutually mistaken in believing that by bringing an action a sale of the land could be forced, and that the balance due the plaintiff could be paid at any time, whether the action was brought within the two years or not, do not, it seems to us, affect the right of the plaintiff to relief, even if we assume that such mistaken beliefs constituted a mistake of law, and entered into the conduct of the plaintiff.

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They do not show, as matter of law, that he was chargeable with culpable neglect, or that justice and equity do not require that his claim should not be paid. There being no culpable neglect on the part of the plaintiff and justice and equity requiring it, it follows that the plaintiff is entitled to judgment for the balance due him.

Decree reversed and case to stand for hearing to determine the amount due the plaintiff and judgment to be entered accordingly.

So ordered.

J. E. Hannigan, (*I. Fox* with him,) for the plaintiff.

J. O. Burdett, for the defendants.

ASA MITCHELL *vs.* ELBRIDGE G. BICKFORD & others.

Suffolk. March 27, 1906. — June 19, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, BRALEY, & SHELDON, JJ.

Mortgage. Cloud on Title. Land Court.

On a petition in the Land Court under R. L. c. 182, § 15, for the discharge of a mortgage incumbering the record title of the petitioner to certain real estate, if the petitioner shows his record title to the property, the incumbrance by the undischarged mortgage, and his possession for twenty years without payment upon the mortgage or recognition of it in any way, he is entitled to a decree discharging the mortgage.

PETITION in the Land Court, filed December 29, 1904, under R. L. c. 182, § 15, for a decree discharging a mortgage incumbering the record title of the petitioner to certain real estate in that part of Boston called South Boston.

In the Land Court *Davis*, J. found the facts which are stated in substance in the next to the last paragraph of the opinion, and made a decree for the petitioner. The respondents appealed to the Superior Court, and presented certain issues to be framed for the appeal. The judge made an order disallowing the issues on the ground that they did not present any matters material to the judgment. To this order the respondents excepted. The judge reported the case to the Superior Court under St. 1905,

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c. 288. The Superior Court dismissed the appeal. The respondents alleged exceptions in the Land Court which were allowed by *Davis*, J.

S. K. Hamilton, *T. Eaton & H. R. Morse*, for the respondents.

B. B. Dewing, for the petitioner.

KNOWLTON, C. J. This is a petition brought under R. L. c. 182, § 15. This section, originally enacted as St. 1882, c. 237, was entitled "An Act relating to the settlement of titles to real estate." As it now appears with additions and amendments in the Revised Laws, it gives one whose record title to land is incumbered by an undischarged mortgage a right to have his title perfected if certain facts appear. If he has been in uninterrupted possession of the land for twenty years after the expiration of the time limited in the mortgage for the full performance of the condition thereof, and if, at a hearing upon his petition, after due notice, this fact appears, and no evidence is offered of a payment on account of the debt secured by the mortgage within twenty years after the expiration of the time limited for the performance of the condition, or of any other act within said time in recognition of its existence as a valid mortgage, he may have a decree entered reciting these facts. This decree may be recorded in the registry of deeds within thirty days after its entry, and it then becomes a bar to the maintenance of an action to enforce a title under the mortgage. At the common law, possession of mortgaged premises by the mortgagor and those claiming under him for twenty years, without recognition of the mortgage or of a debt secured by it, is presumptive proof of payment of the mortgage. In *Cheever* v. *Perley*, 11 Allen, 584, it is said that, to rebut the presumption of payment, "some positive act of unequivocal recognition, like part payment or a written admission, or at least a clear and well identified verbal promise or admission, intelligently made within the period of twenty years, is required." See *Kellogg* v. *Dickinson*, 147 Mass. 432. In *Brintnall* v. *Graves*, 168 Mass. 384, 387, the question was raised whether under this statute the court could properly enter a decree for the petitioner in any case in which it appeared that there was a valid mortgage the condition of which had not been performed. Without deciding it, the court said: "There is much force in the argument that

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the object of the statute is merely to provide for the removal of a cloud from the record title of the real estate, when it is incumbered by an undischarged mortgage which is not shown to be in force, and which has not been recognized by the mortgagor by payment or otherwise within twenty years after the time limited in it for the full performance of the condition thereof."

We are of opinion that the object of the statute is to provide for the removal of such a cloud, and to make twenty years' possession by the mortgagor without recognition of the mortgage, if availed of in these proceedings, an absolute statutory bar to all claims under the mortgage. If the conditions stated in the statute are shown at the hearing the decree is to be entered. The statute has been construed liberally whenever it has been before the court. *Short* v. *Caldwell*, 155 Mass. 57. *Tarbell, petitioner*, 160 Mass. 407. *Brintnall* v. *Graves*, 168 Mass. 384, 387.

In the present case the petitioner showed his record title, the incumbrance by an undischarged mortgage, and his possession for twenty years without payment upon the mortgage or recognition of it in any way. These facts bring him within the statute and entitle him to a decree.

We do not intimate that, upon the facts appearing, he would not be entitled to have his estate relieved from the mortgage under other provisions of law. But it is enough for this case that it is within the statute relied on.

Exceptions overruled.

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NATIONAL CONTRACTING COMPANY *vs.* VULCANITE PORTLAND CEMENT COMPANY.

VULCANITE PORTLAND CEMENT COMPANY *vs.* NATIONAL CONTRACTING COMPANY.

Suffolk. March 29, 1906. — June 19, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, BRALEY, & SHELDON, JJ.

Contract, Construction, Performance and breach. *Evidence*, Extrinsic affecting writings. *Usage*.

If a contract in writing for the sale of goods contemplating various shipments names no times of payment the price of each shipment is payable on delivery.

If a contract in writing for the sale of goods contemplating various shipments names no times of payment, so that its legal effect is to make the price of each shipment payable on delivery, it may be shown that the parties to the contract by their conduct in regard to the bills that were rendered for the various shipments and their payment modified the legal effect of the contract so as to make the terms of payment cash in thirty days after the delivery of each shipment.

In an action on a contract in writing for the sale of goods contemplating various shipments, if it appears that the contract named no times of payment so that its legal effect was to make the price of each shipment payable on delivery but that all the bills were made out by the seller with a statement to the effect that payment should be in cash thirty days after the delivery of each shipment and that the buyer never objected to this and acted in a way to indicate that he adopted this modification of the contract, a finding is warranted that the contract was so modified.

In an action against a manufacturer of cement for alleged failure to deliver cement in various shipments as required by a contract with the plaintiff containing no provision as to times of payment, the defendant may show that it was "a usual custom" of the cement trade at the place of delivery, when cement was sold by manufacturers to consumers and no special agreement was made as to times of payment, to make payments in thirty days after delivery.

Under a contract for the sale of goods to be delivered in various shipments and paid for in cash thirty days after the delivery of each shipment, if the buyer is behindhand in his payments the seller may refuse to deliver more goods until the goods already delivered are paid for in accordance with the terms of the contract.

One who contracts for the purchase of goods by instalments has no right to demand a continued delivery of the goods and at the same time withhold payments due for instalments already received to protect himself from anticipated breaches of contract by the seller.

TWO ACTIONS OF CONTRACT by the respective parties to an agreement in writing printed below, for alleged breaches of that

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contract. Writs dated respectively August 20 and September 19, 1902.

The agreement in writing was as follows:

"Boston, Nov. 7, 1901.

"The National Contracting Co.,
"70 Kilby St., Boston.

"Dear Sirs: —

"The undersigned, the Vulcanite Portland Cement Co., hereby offer to furnish you, F. O. B. cars at Quincy, Mass., and at East Milton, Mass., all of the Portland cement which you may require for building Sections 52, 53 and 54 of the High Level Sewer, Boston, for $1.50 per barrel.

"This offer is made with the understanding that we will allow you 5c each for all sacks returned to us in good condition F. O. B. cars at Vulcanite, Warren County, N. J.; that we will promptly remove at our own expense any cement that may be condemned by the engineer of the Metropolitan Water & Sewerage Board; and that you will be free to purchase cement from other parties in such quantities as may be necessary to keep your work going uninterruptedly in case the engineer of the Metropolitan Water & Sewerage Board will not allow our cement to be used in the works while tests of it are being made or for other cause.

"Very truly yours,
"Vulcanite Portland Cement Co.,
"B. F. Stradley,
"Secretary."

"Accepted by
"The National Contracting Co.,
"By M. W. Cooley,
"Manager."

The course of the proceedings and the material facts are stated or described in the opinion. After the filing of an auditor's report the cases were tried together in the Superior Court before *Hardy*, J., without a jury.

The auditor's report among other things contained the following findings in regard to the time for payments:

"The contract of November 7, 1901, did not specify the time

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when payments should be made by the National Company for cement delivered by the Vulcanite Company, and, as above stated, I find that no express agreement was ever made by the parties as to when such payments should be made.

"On the last day of each month the Vulcanite Company sent to the National Company a statement of the amount due for shipments during the month; and this statement was sent each month whether any cement had been shipped during the month or not, if at the time there was anything due on account of previous shipments.

"On the day following each shipment an invoice thereof was sent to the National Company. All of these invoices (about forty in number) were received by the National Company and had on their face the following words: — 'Terms: Net 30 days.' The three words, 'Net 30 days' were conspicuously stamped on the invoices with red ink. The National Company never made any objection to these terms.

"If the facts are material, I find that in the year 1900, the Vulcanite Company sold and delivered to the National Company eight thousand five hundred barrels of cement. There was no agreement between the parties as to when payments or deliveries should be made. Cement was shipped in May, June, July, August, September and October, 1900. The May shipments, of which the average date was May 18, were paid for by the National Company on June 18. The June shipments, of which the average date was June 24, were paid for on July 25. The July shipments, of which the average date was July 10, were paid for on August 27. The August shipments, of which the average date was August 16, were paid for on September 27. The September shipments, of which the average date was September 25, were paid for on October 20. The October shipments, of which the average date was October 3, were paid for on November 20.

"If material, I also find that during the period covering the transactions involved in these cases and for some years prior thereto it was a usual custom of the cement trade in Boston, where cement was sold by manufacturers to consumers and no special agreement was made as to the time of payments, for payments to be made for said cement in thirty days after delivery.

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"On all the evidence as above stated, I find that soon after the contract of November 7, 1901, was executed and performance thereof begun, it came to be understood and impliedly agreed between the parties that payments for cement delivered by the Vulcanite Company should be paid for by the National Company in thirty days after delivery."

The National Contracting Company, called in the opinion the plaintiff, asked the judge to rule as follows:

"First: To confirm the following rulings of the auditor. That under the circumstances existing after July 1, 1902, the National Company was justified in declining to make further payments until its orders for cement were complied with; and that if it was not so justified, its failure to make payments as requested was not such a breach of the contract as justified the refusal of the Vulcanite Company to go on with it.

"That the National Company is entitled to recover the damages caused it by the failure of the Vulcanite Company to deliver the cement required by the National Company for its work; and that such damage is the difference between what the National Company paid for five thousand six hundred and seventy-three and three fourths barrels of cement in the market, — this sum being as already stated, the fair market price, — and the price named in the contract.

"That under the practice established in this Commonwealth (*Star Glass Co.* v. *Morey*, 108 Mass. 570) the cases having been tried together the damages in the action for breach of contract (the first case) should first be applied to cancel the sum due the Vulcanite Company for the cement delivered, and there should be a finding for the plaintiff in the first case (the National Company) for the balance. Applying the above rule that the Vulcanite Company, the plaintiff in the second case, is not entitled to recover and that the National Company, the plaintiff in the first case, is entitled to recover the amount as found by the auditor.

"Second: That the facts found by the auditor and evidence relating thereto as to transactions between the parties in 1900 are immaterial and inadmissible.

"Third: That the facts found by the auditor as to 'a usual custom' are immaterial and inadmissible.

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"Fourth: That the finding of the auditor that 'it came to be understood and impliedly agreed between the parties' that payments should be made in thirty days, is immaterial."

The judge refused to make any of these rulings.

The Vulcanite Portland Cement Company, called in the opinion the defendant, asked the judge to rule as follows:

"1. That no time being specified in the writing of November 7, 1901, for deliveries, deliveries must be made within a reasonable time, to be determined with reference to the circumstances expressly mentioned in the contracts between the plaintiff and the Metropolitan Board and the Vulcanite Company and in correspondence, to wit, the uninterrupted building of the sewer.

"2. That as nothing is said in the writing of November 7, 1901, with reference to payments, the necessary construction would be, payment on delivery of each shipment, unless by oral evidence which throws light upon the facts and the subject matter, it appears that the parties well understood and acted upon the understanding that payments were not to be cash on delivery but were to be made in thirty days from shipment, in which event there is to be written into the writing of November 7, 1901, the terms of payment actually intended by the parties, to wit, thirty days after delivery.

"3. That any given failure by the Vulcanite Company to insist upon payments as agreed '30 days' was not, as matter of law, a waiver of the right to decline subsequently to make further deliveries because of the refusal of the plaintiff to pay for such past deliveries.

"4. The defendant had the right on July 9 and any time thereafter while the plaintiff continued in default as to payment for past deliveries, to refuse further deliveries, if under all the circumstances the defendant might reasonably conclude that the failure to pay was chronic and would continue to be so. In such a state of things the defendant was not obliged to continue to deliver.

"5. Whether as matter of law the plaintiff did or did not repudiate the contract is immaterial, for even if it had not repudiated, there may have been, upon the facts, such a breach by its failure to pay, as justified the refusal by the defendant to go on with it."

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The judge made the second, third, fourth and fifth rulings as requested, and made the first ruling as far as and including the words "reasonable time." As bearing upon the rest of this ruling as requested, he mentioned a finding of the auditor that the defendant did not know the specific terms of the contracts referred to in the request previous to November 7, 1901.

The judge made a memorandum of findings in the first case in part as follows:

"The defendant company on November 7, 1901, had no specific knowledge of the provisions of the contract between the plaintiff and the metropolitan board. The contract of November 7, 1901, indefinite as to time of payment and delivery, vaguely states that there is to be furnished 'all of the Portland cement which you may require,' etc. The auditor found that such cement was to be used by the plaintiff in its work under said contracts and that the amount required would be five thousand barrels or more, so far as the defendant knew or was informed by the plaintiff during the negotiation of the contract. In the absence of any other contract, correspondence or conversation between the parties this might have meant any amount above five thousand barrels or about that amount. In the letter of July 12, 1902, . . . the defendant stated that it supposed from Mr. Cooley's figures given to Mr. Stradley that five thousand six hundred barrels would complete the work. Before May 1, 1902, six thousand two hundred and fifteen barrels were delivered in such manner as to cause no complaint. Upon this evidence indicating an uncertainty as to the amount that would be required and the other findings and facts in testimony stated in the report I do not find that there was a waiver by the defendant of the conditions as to payment of the amounts of the indebtedness overdue from the plaintiff. The correspondence on the part of the defendant before July 12, 1902, is as consistent with the fact that it may have understood that it had furnished much more cement than was supposed originally to be required by both parties as with any fact alleged in argument by the plaintiff to show any other motive. On the facts and circumstances in evidence as reported by the auditor and as heard by me I do not agree with his findings that the defendant was in default."

In the first case the judge found for the defendant. In the

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second case, in which the Vulcanite Portland Cement Company was the plaintiff, the judge found for the plaintiff in the sum of $3,235.99. The National Contracting Company alleged exceptions in both cases.

F. W. Grinnell, for the National Contracting Company.

G. L. Huntress, for the Vulcanite Portland Cement Company.

KNOWLTON, C. J. The first of these cases is an action brought to recover damages for a refusal of the defendant to furnish to the plaintiff a quantity of Portland cement according to the terms of a contract in writing made by the parties. The second is an action by the defendant in the first action to recover from the plaintiff in that action the price of cement delivered under this contract. The cases were heard before an auditor who found for the plaintiff in the first action, whom we will hereinafter call the plaintiff, and he allowed, in diminution of the plaintiff's claim, the amount due for cement delivered to the defendant in the first action, who will hereinafter be called the defendant. The case was afterwards tried before a judge without a jury, no evidence being introduced except the auditor's report, and such evidence, documentary and oral, as either party chose to offer of that which previously had been received by the auditor. The judge reversed the decision of the auditor and found for the defendant, holding the plaintiff liable for the price of that which was delivered and not paid for. The contract signed by the parties was silent as to the time of payment. The legal effect of the contract was, therefore, to make the price of the goods payable on delivery. *Fessenden* v. *Mussey*, 11 Cush. 127. *Stephenson* v. *Cady*, 117 Mass. 6. *Morton* v. *Clark*, 181 Mass. 134. Both the auditor and the judge found that the parties subsequently, by their conduct in regard to the various shipments made and bills rendered and payments of the bills, impliedly agreed with each other that the writing should be modified in its legal effect in this particular, and that the terms of payment should be cash in thirty days after the delivery of each shipment. All the bills were made with a statement to this effect, and the plaintiff never objected to it, but acted in a way to indicate that it adopted this modification of the contract proposed by the defendant. We are of opinion that this finding was well warranted by the evidence.

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By the contract the defendant agreed to furnish all the Portland cement that the plaintiff might require for building sections fifty-two, fifty-three and fifty-four of the high level sewer, Boston, for $1.50 per barrel. The fair interpretation of the contract is that the cement was to be furnished from time to time upon orders, as needed, within a reasonable time after the receipt of the orders. The contract was dated November 7, 1901. Cement was ordered and delivered under the contract from time to time after that date, the last shipment being in June, 1902. On May 28, 1902, the defendant wrote to the plaintiff that, on account of a failure to obtain completion of its mill, number three, by May first, as it had expected to, it was extremely short of cement and much behind with its orders, and it asked for one month's notice of shipments required in the future, and intimated that for a time it would not be able to fill orders promptly. On May 31, 1902, the defendant had orders from the plaintiff for thirteen hundred barrels, then unfilled. From that time the defendant failed to send all the cement ordered, and thus caused the plaintiff some inconvenience; but up to July 18 the plaintiff did not attempt an enforcement of its rights in this particular, and tried to get on as well as possible with such performance as the defendant was able to give. In the meantime the plaintiff was considerably behind in its payments, but the defendant made no serious complaint about it, although the judge found as a fact that it did not waive its legal right to payment according to the modified contract.

The crisis came when, on July 18, the defendant being much behind in its shipments and the plaintiff being much behind in its payments, the plaintiff wrote to the defendant, demanding prompt shipments in accordance with its orders, and stating that on the defendant's failure to fill the orders promptly, it should buy in the market and charge the defendant with the excess above the contract price. The market price of cement had risen considerably after the date of the contract. To this letter the defendant replied on July 21, demanding payment of so much of the account as was overdue, with prompt remittances in the future. In this letter the defendant stated that it would make no more shipments until it received payment for the two items which were then overdue. The plaintiff answered this letter on

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July 23, 1902, demanding the filling of its orders for cement, stating that it had already been obliged to buy elsewhere at considerable expense in order to go on with the work, and declining to pay the overdue account, and proposing to hold the money as security for damages already suffered and that might afterwards be suffered from the defendant's breach of the contract. As a result of the attitude thus taken by the respective parties these actions were brought.

Up to the time of the writing of the defendant's letter of July 21, demanding payment of the overdue account and refusing to deliver any more cement until this should be paid, the plaintiff made no claim upon the defendant for damages caused by the delay in filling orders, and it does not appear that the plaintiff had suffered any substantial damages. Upon the evidence, the judge might well find that the plaintiff waived any claim that it might have made on account of the defendant's default up to that time. Of course it had a right to insist upon perfect performance in the future; but the plaintiff's failure to pay for the cement when the bills were due left the defendant with a right to insist at any time that these payments should be made. Such payments might be demanded as a condition precedent to the delivery of any more cement. *Eastern Forge Co.* v. *Corbin*, 182 Mass. 590, 593. *National Machine & Tool Co.* v. *Standard Shoe Machinery Co.* 181 Mass. 275, 279. *Stephenson* v. *Cady*, 117 Mass. 6. *Wilkinson* v. *Blount Manuf. Co.* 169 Mass. 374. The defendant made its demand, and stood on its right to have pay before making any more deliveries. The plaintiff sought to hold the money as security for damages from possible breaches of the contract by the defendant in the future.

We think it quite plain that the plaintiff could not lawfully do this. It could not be known that there would be any breach of the contract of the defendant in the future if the plaintiff made the payments then due and afterwards paid promptly. One who contracts for the purchase of goods by instalments cannot lawfully demand performance of the contract, and at the same time withhold payments due for instalments already received in order to protect himself from anticipated breaches of the contract by the seller. *Stephenson* v. *Cady*, 117 Mass. 6, 9, 10. *Spaulding* v. *Backus*, 122 Mass. 553. *Wiley* v. *Bunker Hill*

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National Bank, 183 Mass. 495. The technical insolvency of the plaintiff, because of large advances of money by the corporation that owned most of its capital stock, did not affect the defendant's rights in this particular. So far as appears, this condition did not interfere with the plaintiff's performance of its contracts, made in the usual course of its business. *Hobbs* v. *Columbia Falls Brick Co.* 157 Mass. 109. *Jewett Publishing Co.* v. *Butler*, 159 Mass. 517. *Spaulding* v. *Backus*, 122 Mass. 553. *Wiley* v. *Bunker Hill National Bank*, 183 Mass. 495.

Upon the findings of the judge, the first request of the plaintiff for a ruling was rightly refused. The second, third and fourth requests of the plaintiff were also rightly refused. The matters referred to in them were all proper for consideration on the question whether the parties, after the making of the contract, by the new arrangement impliedly agreed that the payments might be made at the expiration of thirty days' credit. If, as the plaintiff argues, under a contract calling for cash on delivery, the effect upon the rights of the parties of delivering goods without payment at the time might be different as to future performance without payment of the goods already delivered, from the effect of such deliveries without payment when payments are due under a contract giving a specified credit, then the change in the time for payment was material. If the law is the same when the contract calls for cash on delivery as when the sales are on credit, these matters did the plaintiff no harm.

The rulings given in accordance with the defendant's requests are covered by what we have already said. In both cases the entry will be

Exceptions overruled.

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ALEXANDER URQUHART *vs.* SMITH AND ANTHONY COMPANY.

Suffolk. March 30, 1906. — June 19, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Negligence, Employer's liability, Assumption of risk. *Snow and Ice. Evidence*, Presumptions and burden of proof.

A plank walk leading from the rear of an iron foundry to a privy provided for the accommodation of the workmen can be found to be a part of the permanent ways of the foundry, so that both at common law and under R. L. c. 106, § 71, it is the duty of a corporation operating the foundry to maintain the walk in a suitable condition for the use of its workmen, and if snow and ice are allowed to accumulate on the walk in such quantities that when trampled and then frozen the surface is rendered uneven and dangerous and so continues for several days until a workman falls upon it and is injured, there is evidence of negligence on the part of the corporation toward the injured workman.

A plank walk maintained by an employer for the use of his workmen, which is constructed properly but temporarily is rendered less convenient for travel by an accumulation upon it of snow and ice, may be used by the workmen in the course of their employment without negligence being imputed to them as matter of law if they are injured from falling by reason of the condition of the walk.

If a workman uses a plank walk, which it is the duty of his employer to maintain in a suitable condition, knowing from his previous use of the walk that it is covered with uneven and ridgy snow and ice, and knowing also that the night before a light snow has fallen which may cause his footing to be still more unstable, this does not make his use of the walk negligent as matter of law, and if he sues his employer for injuries from a fall caused by the condition of the walk the question of his due care may be one for the jury.

If a workman is injured by falling on a plank walk, which it is the duty of his employer to maintain in a suitable condition, and which is in a dangerous condition caused by an accumulation of snow and ice, the fact that he could have gone to his destination by another way which was free from snow and ice but less convenient does not as matter of law show that he was negligent in using the walk, and in an action against his employer for his injuries the question of his due care may be one for the jury.

A workman in an iron foundry does not assume the risk of injury from falling by reason of a dangerous accumulation of snow and ice which his employer negligently has allowed to remain on a plank walk leading from the rear of the foundry to a privy provided for the accommodation of the workmen.

In an action under R. L. c. 106, § 71, by a workman in a foundry against his employer for injuries caused by falling on a plank walk intended for the use of the workmen on which the defendant negligently had allowed a dangerous accumulation of snow and ice to remain, if the defendant relies on the provision of § 77 of the same chapter that such an employee shall have no right of action if he "knew of the defect or negligence which caused the injury, and failed within a reasonable time to give, or cause to be given, information thereof to the

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employer," the burden of proof is on the defendant to establish this defence affirmatively, and even if the plaintiff admits knowledge of the snow and ice it still is a question of fact for the jury whether he also should have known before the experience gained by his fall that the walk thus was made defective.

TORT for personal injuries received while in the employ of the defendant, with two counts, one under the employers' liability act and the other at common law. Writ dated June 23, 1902.

At the trial in the Superior Court before *Hardy*, J. it appeared that the plaintiff was a pattern maker in the employ of the defendant at its iron foundry in Wakefield; that while engaged in his employment he had occasion to go to a privy situated a short distance from the rear of the shop in which he worked; that in attempting to go there he was injured by falling upon a plank walk extending from the rear door of the shop toward the privy; that the plank walk was fourteen feet long and twenty-seven inches wide; that the end next to the shop was six inches below the threshold of the door and fourteen inches above the ground and that the walk sloped downward from this point, the ground beneath it being level, the end next to the privy being six inches above the ground, thus causing a pitch of eight inches in the fourteen feet of the walk.

The accident happened on January 16, 1902, between eight and nine o'clock in the morning. On that morning, and for several days previous or longer, this walk was covered with ice and frozen and trampled snow from two and one half to three inches thick, in a rough condition near the door and at the farther end, but in a smoother condition near the middle of the walk. During the night or early morning there had been a light flurry of snow. No sand or ashes were on the walk. The buildings and the walk had been situated in the same way for at least ten years preceding the accident.

The following is the testimony of the plaintiff in regard to the way he took to go to the privy and the other way which he did not take: "*Q.* Did you leave your room that morning after you had entered it, the room in which you worked? *A.* I did. —*Q.* For what purpose did you leave it the first time? *A.* The first time? I left it for the purpose of going to the privy. —*Q.* How did you have to go to get to the privy from your

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room? *A.* Go out of my room and go along through the brass shop, come to the stairway, and you go down that stairway, go out through a hall, they use a run to go from one shop to the other, and then I turn out this door to the left and go out this plank walk. — *Q.* Now, is that the way you went to the privy that morning? *A.* That is the way. — *Q.* Is there any other way in which you could go to the privy? *A.* There is. — *Q.* Describe the other way? *A.* Well, the other way leads from the same floor, the stairway, you go out through a hall similar to what I have described, only it is a stairway that is boxed up on both sides, there is no light in it whatever, it is very dark. — *Q.* And which is the most, — which is the shortest way from where you were to go to the privy, from where you were working, which is the shortest way to go? *A.* I should say the shortest way would be the way I ordinarily go. — *Q.* The way you went that morning? *A.* The way I went that morning. — *Q.* Which is the lightest way to go? *A.* The way I went that morning is the lightest. — *Q.* You have been both ways? *A.* I have." Later the plaintiff testified that the way he went "was the usual way" for the men in the shop to go, and on cross-examination said that "the men went both ways to get to the privy."

At the close of the evidence the defendant asked the judge to rule that upon all the evidence the plaintiff was not entitled to recover upon either count of his declaration. The judge refused to rule as requested and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of $2,000. The defendant alleged exceptions.

The case was argued at the bar in March, 1906, before *Knowlton*, C. J., *Morton*, *Lathrop*, *Braley*, & *Sheldon*, JJ., and afterwards was submitted on briefs to all the justices.

W. H. Hitchcock, for the defendant.

J. W. Pickering & E. H. Hadley, for the plaintiff, submitted a brief.

BRALEY, J. Upon the evidence the jury could have found that the plank walk was a part of the permanent ways of the defendant's manufactory designed for the use of its employees in passing to and from the privy provided for their accommodation, and which was located at the rear of the shop where the plain-

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tiff worked. *Coffee* v. *New York, New Haven, & Hartford Railroad*, 155 Mass. 21, 23. *Prendible* v. *Connecticut River Manuf. Co.* 160 Mass. 131. *McMahon* v. *McHale*, 174 Mass. 320. Being thus connected and forming a part of the establishment, whether at common law or under R. L. c. 106, § 71, it became the duty of the defendant to maintain the walk in suitable condition for the convenience of the plaintiff, and if snow and ice were accumulated in such quantities that upon being trampled and then frozen the surface was rendered uneven and dangerous, and so continued for several days before the accident, there was evidence that by reason of its negligence this duty had not been discharged. *Geloneck* v. *Dean Steam Pump Co.* 165 Mass. 202. The principal defence relied upon, however, is that the plaintiff was not in the exercise of due care or assumed the risk. In support of this contention it is urged that the unsafe surface of the walk was obvious, and from the plaintiff's evidence undoubtedly it appeared that from previous use he was aware not only of the presence of uneven and ridgy snow and ice, but also that the night before a light flurry of snow had fallen which might tend to cause his footing to be still further unstable. But what effect this knowledge of the combination should have had upon the reasonable care required of him could be found to depend upon the nature of the defect. *Street* v. *Holyoke*, 105 Mass. 82. *Moylon* v. *McDonald Co.* 188 Mass. 499, 501. The jury might come to the conclusion that the walk had not been rendered impassable, and that it was possible to pass over it in safety, or that in attempting to pass, although in a general way appreciating the slippery and uneven nature of the surface, the plaintiff had not failed to exercise ordinary care. *Mahoney* v. *Metropolitan Railroad*, 104 Mass. 73. *Mahoney* v. *Dore*, 155 Mass. 513, 518. A plank walk, not structurally defective, and properly constructed, but which temporarily may be less convenient for travel owing to an accumulation of ice and snow, still may be used by the servant in the course of his employment without negligence necessarily being imputed to him. *Fitzgerald* v. *Connecticut River Paper Co.* 155 Mass. 155, 157, 158. *Rooney* v. *Sewall & Day Cordage Co.* 161 Mass. 153, 159. *Bence* v. *New York, New Haven, & Hartford Railroad*, 181 Mass. 221, 226. That another way of communication was available, of

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which the plaintiff knew, and where he would not have been exposed to a similar possible danger, does not conclusively establish the proposition that he was careless. There may be instances where the danger of using one passageway, that occasionally is used as a means of communication between different points in a railroad yard instead of another which is commonly taken, may be so extreme and manifest, that a servant, who, either in disobedience of any order directing him to take the safer course, or to gain time, chooses the first as a shorter or more convenient route and is injured, may be held, by his willingness to take chances which ordinary prudence would have condemned as careless, to be guilty of such negligence as to preclude recovery. *Galvin* v. *Old Colony Railroad*, 162 Mass. 533. But here, as the opportunity afforded the plaintiff was without the distinction that usually one road was considered safer than the other, his choice at most was evidence to be considered only as bearing upon the question of his negligence. It manifestly could not have been ruled as matter of law that because the plaintiff observed the icy surface, he fully appreciated the probability of being injured and then voluntarily exposed himself to any danger that might be incurred by attempting to use the walk. *Thomas* v. *Western Union Telegraph Co.* 100 Mass. 156. *Wagner* v. *Boston Elevated Railway*, 188 Mass. 437, 441, and cases cited. Such an issue is for the jury. *Mahoney* v. *Dore*, *Wagner* v. *Boston Elevated Railway*, *ubi supra*. Neither in principle, nor substantially upon the evidence, would there seem to be any sound distinction between the present case and *Fitzgerald* v. *Connecticut River Paper Co.* 155 Mass. 155. The plaintiff in that case was injured by falling on a stairway outside the building where she worked, but which was used by the employees, and had become slippery and unsafe by escaping steam which froze as it fell on the treads. It was held, that whether treated as an assumption of the risk or as a question of due care, the issue of the plaintiff's negligence was for the jury. The difference between ice formed by the freezing of melted snow and that formed by the freezing of the moisture caused by precipitated steam, where in each instance the ice makes a coating which may render the surface, whether consisting of steps or of a plank walk, unsafe for use by those having occasion to

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lawfully pass over either, is not apparent. The defect is caused by the same element, and although the circumstances of each case may vary, yet the care required of the servant is only reasonable diligence, and it cannot be said as matter of law, that to use a plank walk is more unsafe than to use stairs, when each has become coated with ice through the negligence of the master. *Mahoney* v. *Dore*, *ubi supra*. In actions for injuries caused by defects in public ways it also has uniformly been held not only that the doctrine of contributory negligence is applicable, but that previous knowledge by the person injured of an open defect, or of a general condition which ultimately proves to be a defect, is not sufficient generally to prevent recovery. *Snow* v. *Provincetown*, 120 Mass. 580, 588. *Little* v. *Brockton*, 123 Mass. 511. *Woods* v. *Boston*, 121 Mass. 337. *Norwood* v. *Somerville*, 159 Mass. 105. *Torphy* v. *Fall River*, 188 Mass. 310, 314. *Campbell* v. *Boston*, 189 Mass. 7, 10, and cases cited.

In neither case is the traveller, or the servant, freed from the duty of exercising reasonable care, but even with such knowledge, where the roadbed is unimpaired, and the way is apparently left open for use, how far his reliance upon the presumption that the public authorities or the master had performed the duty of making it reasonably safe should have affected his conduct, when the question of his negligence is raised, results in a question of fact and not of law. *Thompson* v. *Bridgewater*, 7 Pick. 188. *Lawless* v. *Connecticut River Railroad*, 136 Mass. 1, 3. *Moynihan* v. *Hills Co.* 146 Mass. 586, 591, 592.

A further defence is interposed that under R. L. c. 106, § 77, if the plaintiff knew of the defect and did not inform the defendant, or some person entrusted by it with general superintendence, he is barred from any remedy for the injury. This section does not require notice of latent defects of which by reason of their character the servant may be ignorant until thereby injured, nor is the requirement where the defect is known a precedent condition, compliance with which must be shown by the plaintiff, but is a matter of defence, with the burden of proof resting upon the defendant. *Murphy* v. *Marston Coal Co.* 183 Mass. 385, 388. *Connolly* v. *Waltham*, 156 Mass. 368, 371. If the plaintiff admitted knowledge of the snow and ice, it still would be an issue of fact whether he also should have known before

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the experience gained by his fall and consequent injury, that the walk was thus made defective. Indeed, even if the defect of itself had not been transitory but of a permanent character, which would exist where the structural condition of the ways, works and machinery or of their adjustment had become so impaired that further use might be attended with obvious danger, yet in all cases it would not follow that an employee must be presumed conclusively to know that the change constituted a defect within the meaning of the statute, although in some instances such knowledge might be imputed from the common experience of mankind.

It is to be assumed that full and accurate instructions were given upon this as well as upon the other issues as no exceptions were taken to the charge to the jury, to whom the case was properly submitted. A majority of the court is of opinion that the order must be,

Exceptions overruled.

WILLIAM O. FALARDEAU *vs.* D. BLAKELEY HOAR & another.

Suffolk. March 30, 1906. — June 19, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, BRALEY, & SHELDON, JJ.

Negligence.

If a person has passed many times through a corridor of a building and in doing so has walked over a trap door four feet square which can be lifted out by a ring, never having seen it open and not knowing it was there, and if in the performance of his duty and walking in the usual way he again passes along the same corridor by daylight at a time when the trap door has been taken off and the opening is left without barriers or anything else except the opening itself to indicate that the floor is not in its usual safe condition, and walks into the opening and is injured, in an action against the persons in control of the building for his injuries the question of his due care is for the jury.

If those in control of a building maintain a trap door in one of its corridors set in an opening in the floor four feet square and lifted out by a ring, the opening being used only about twice a week, it is their duty to furnish suitable barriers, or objects which may be used as such, so that their servants when they have occasion to remove the trap door can guard or warn persons passing along the corridor without knowledge of the opening, and, in an action against them by a person injured from walking into the opening, a failure to provide for the use of such barriers is evidence of their negligence.

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In an action against those in control of a building by one temporarily in their employ who was injured by falling into an opening in the floor of one of the corridors of the building from which a trap door had been removed by an assistant janitor without guarding the opening by any barrier, if it has been found that the defendants had made no provision for a barricade or warning, it is no defence that it was the practice of the janitor and the assistant janitor when the trap door was taken off to place a ladder or settee or other object across the corridor, that such articles were kept in a room near by, and that the accident was caused by the negligence of the assistant janitor, a fellow servant of the plaintiff, in omitting this customary precaution, unless it also is shown that such precautions were taken with the knowledge and approval of the defendants.

TORT, against the trustees of the Boston Art Students' Association in control * of a building called the Grundmann Studios on Clarendon Street in Boston, for personal injuries from falling through an open trap door in the floor of a corridor of that building. Writ dated January 12, 1903.

In the Superior Court the case was tried before *White*, J. The jury took a view of the premises. The plaintiff testified as follows:

"I am a gilder, painter and decorator, and reside at Neponset. I am forty-nine years old. The accident happened on September 7, 1899. On the day before the accident, I had been calcimining on the second floor of the Grundmann Studios in the corridor at the entrance numbered 194. I was engaged by Wildes, was paid probably twenty-five cents per hour and did not furnish my own materials. On the morning of the accident I entered the building at entrance No. 194, and immediately went up the stairs to see how the calcimining looked. As I turned to go down stairs, I met Wildes coming up stairs. Wildes was the janitor who had employed me. He was also engineer in the building. He looked after the rooms, waited on the artists who had studios there, and occasionally painted and swept. He may have calcimined with me the day before but I think not. King helped with the ladder. Wildes told me to give the calcimine another coat. I left Wildes at the head of the stairs, and went down stairs to get some paint. Turning into the other corridor, I met King. King was an assistant to the janitor, who worked about the building, cleaning and sweeping, and doing odd jobs. I remember taking five or six steps

* See *Falardeau* v. *Boston Art Students' Association*, 182 Mass. 405.

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after I passed King, and that is the last thing I remember until I came to myself in the hospital. I do not recall falling at all. King was about three feet away from the corridor in which the stairway is. I was walking in the ordinary way, and not running, and my eyesight was perfectly good."

The plaintiff, besides giving other testimony, further testified as follows: "I have worked at Copley Hall [in the same building] ten times, more or less, generally as watchman, sometimes four or five weeks at a time. I had probably passed over the spot where the trap door is fifty times, more or less, but had never seen the trap door, and did not know that it was there. It is about four feet by four feet with a lifting ring on it. The day of the accident was a fair one; the door faces toward the east or northeast, and the time was about eight o'clock in the morning." The trap door was used twice a week for raising and lowering ashes, and rarely for anything else.

Other material evidence is described in the opinion.

At the close of the evidence the defendants asked the judge to rule that on all the evidence the plaintiff could not recover. The judge refused to give this ruling. At the request of the defendants he ruled that Wildes and King were fellow servants of the plaintiff.

The defendants further asked the judge to give the following instruction to the jury: "If a trap door in a corridor is used from time to time, and the owners or persons in control of the corridor have supplied materials near at hand which are suitable to be used as barricades, and when the hole is opened from time to time these barricades are customarily used, then the failure to use them in a particular instance on the part of a servant using the hole, is not negligence which is imputable to the employers in favor of another fellow servant who falls into the hole because the barricades were not used." The judge refused to give this instruction as requested, but instead modified the instruction by giving it in the language quoted in the opinion.

The defendants excepted to the refusal to give the instruction requested and to the charge as given in so far as it stated that knowledge on the part of the owners or persons in control was a requisite.

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The jury returned a verdict for the plaintiff in the sum of $1,000; and the defendants alleged exceptions.

E. F. McClennen, (*H. F. Lyman* with him,) for the defendants.

C. E. Washburn, for the plaintiff.

KNOWLTON, C. J. The plaintiff, while temporarily employed in a building held and managed by the defendants as lessees, fell through a trap door in the floor of one of the corridors, and was injured. This trap door was set in an opening in the floor, and could be lifted out of the opening by a ring. There was much contradiction between the defendants' witnesses and the plaintiff in regard to some of the material facts in the case; but as the jury presumably believed the plaintiff, we must consider the exceptions in the aspect of the testimony which is most favorable to him.

He testified that he had often passed through this corridor but never had noticed the trap door. We cannot say as matter of law that his failure to notice it shows a lack of due care. *Johnson* v. *Field-Thurber Co.* 171 Mass. 481. According to his account of the accident, he was passing through the corridor in the performance of his duty, walking in the usual way, when he met King, an assistant of the janitor, and went on a little further, after which he remembered nothing more until he found himself in the hospital. The evidence showed that King had taken out the trap door to put some ash cans into the cellar, leaving an opening in the floor four feet square, through which the plaintiff fell. There was nothing there but the opening to indicate that the floor was not in its usual safe condition. There was testimony from a medical expert that a person receiving a severe blow on the head as the plaintiff did, ordinarily loses the recollection of everything occurring immediately before the blow. We are of opinion that it was a question for the jury whether the plaintiff, walking there in an ordinary way in the performance of his duty, was in the exercise of due care, even though he failed to notice an opening in the floor in a corridor where he had always found the floor in perfect condition, and where he had reason to believe that it was absolutely safe. *Thyng* v. *Fitchburg Railroad*, 156 Mass. 13. *Maguire* v. *Fitchburg Railroad*, 146 Mass. 379. If, in looking forward, the corridor seemed in its usual condition, we cannot say as matter

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of law that he was bound so to scrutinize the floor as to be sure that there was no opening in it. The danger that one might step into such an opening without noticing it was recognized by the janitor, who testified as follows: "I had always put a step ladder or settee there as a protection when I opened the trap door. I did not give King any instructions to do this on the morning of the accident, and I did not look to see whether it had been done, because he had always put something there, and of course I supposed he knew enough to do it that time."

The defendants contend that there was no evidence of negligence on their part. It was their duty, in a general way, to have the building in a safe condition for those who were working in it. An opening in the floor of a corridor rendered it unsafe for those who had occasion to pass through the corridor without knowledge of the opening. Such an opening was in the nature of a trap for those who were ignorant of it, and it was the duty of the defendants to give warning of it. This opening would be made only at intervals by the defendants' servants for the performance of particular duties. If the defendants provided proper barriers or other means of protection for those walking there, which were to be used by their servants whenever the door was lifted up, the use of these barriers might be entrusted to servants in connection with their work which involved the opening of the trap door. *Moynihan* v. *Hills Co.* 146 Mass. 586. At the time of this accident no barriers were used and no warning was given. From these facts, unexplained, the jury might infer negligence on the part of the defendants. *Griffin* v. *Boston & Albany Railroad,* 148 Mass. 143. *Savage* v. *Marlborough Street Railway,* 186 Mass. 203. *Feital* v. *Middlesex Railroad,* 109 Mass. 398. By way of explanation the defendants offered evidence that when the door was opened it was the custom to barricade the opening by putting across it "a ladder or settee or anything that would go across there," and that such articles were kept in a room near by. The judge left to the jury the question whether the defendants had made provision for a barricade, by an instruction in these words: "Now this is a question for you. If there were barriers provided, and if from the custom there of using those barriers the defendants in the line of their supervision

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knew that those were being used for barriers, and that Wildes [the janitor] and King were using them as barriers, why, then they had done all that the law required of them, and the act would become the negligent act of a fellow workman, namely King, in the failure to use those things which were provided as barriers and which the defendants in the line of their supervision knew were being used for that purpose." This instruction was correct. The defendants requested a similar instruction, which omitted in its hypothetical statement the element of intention on the part of the owners or persons in control of the building that the articles which were suitable for making a barricade should be used for that purpose, and the element of knowledge that they were so used, and they excepted to the refusal to give the instruction, and to the instruction given so far as it included knowledge on the part of the owners as a requisite.

This exception must be overruled. If the defendants had made no provision for a barricade or warning, and had no knowledge that ladders or settees were used as barriers, and these things were sometimes so used without their knowledge, they would not be relieved from liability for an accident at a time when they were not used, and when they had made no provision for erecting a barrier or giving a warning.

The jury must have found that the defendants made no proper provision for giving warning.

Some evidence that the testimony of Wildes and King should not be given the effect imputed to it by the defendants is found in the fact that the defendants, while seemingly stating in their answers to interrogatories the facts relied upon by them as a defence, did not refer to any provision of this kind.

Exceptions overruled.

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JOSEPH M. HOLLYWOOD & another, executors, *vs.* FIRST PARISH IN BROCKTON.

Plymouth. April 2, 1906. — June 19, 1906.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Practice, Civil, Agreed statement of facts. *Landlord and Tenant,* Assignment, Covenant of lessor. *Covenant. Religious Society. Corporation, Ultra vires. Words,* "Lessees."

If an agreed statement of facts states that a certain parish made a lease "of a vacant lot of land," and it appears by the lease, a copy of which is annexed to the agreed facts, that the land leased was a portion of a lot of land owned by the parish and called the Parish Green, and that "the old meeting house now standing thereon" was sold by the parish to the lessees for a sum named, these statements in the lease contradict and control the statement in the agreed facts that the lot was vacant.

If an agreed statement of facts states that a certain person was a sublessee of a part of certain land "for a time equal to the remainder of the term of the original lease," this in legal effect is a statement that the person named was an assignee of the lease as to the portion of the premises stated to be sublet to him.

One who acquires the whole estate of a lessee of land in a portion of the land covered by the lease is an assignee and not a subtenant.

A covenant in a lease of land with the lessees and "their heirs and assigns" that at the termination of the lease the lessor or its successors will extend the lease to the lessees "or their heirs and assigns on reasonable terms for a reasonable time, or pay to them, . . . and their heirs or assigns a just and reasonable sum for such buildings and improvements as they, the said lessees may have put thereon," includes not only payment for buildings put upon the land by the lessees personally but also for those put there by a subtenant or an assignee, and the covenant being made with the lessees and their assigns runs with the land under the rule laid down in the second resolution in *Spencer's case,* 5 Coke, 16 a, b.

Where a religious society has no further use for an old meeting house and the land on which it stands, abutting on a business street, it is not *ultra vires* for the society to let the land to a lessee who agrees to buy the meeting house and to covenant to pay to such lessee or his assigns on the termination of the lease a just and reasonable sum for such buildings and improvements as shall have been put upon the land during the term of the lease.

CONTRACT by the executors of the will of Peter F. Hollywood, on a covenant contained in a lease by the First Parish in North Bridgewater, afterwards the First Parish in Brockton,* to Win-

* By St. 1874, c. 113, the town of North Bridgewater was authorized to change its name to Brockton, and on May 5, 1874, voted to take that name.

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throp S. Baker and Rufus P. Kingman, dated March 21, 1854, for the term of fifty years, the administrator *de bonis non* of the estate of Baker and the executor of the will of Kingman on March 15, 1904, having assigned a portion of the premises and rights included in the lease to the plaintiffs' testator, who erected on the portion of the premises assigned to him a building costing $5,000 and worth at the time of the expiration of the lease $4,000, the covenant sued on being as follows: "And the said Parish further agrees and covenants to and with said Baker and Kingman, their heirs and assigns, that when this lease shall have terminated they, the said Parish or their successors will then extend the lease thereof to the said Baker and Kingman or their heirs or assigns on reasonable terms for a reasonable time, or pay to them, the said Baker and Kingman and their heirs or assigns a just and reasonable sum for such buildings and improvements as they, the said lessees may have put thereon." Further alleging that the defendant refused to extend the lease or to pay to the plaintiffs' testator a just and reasonable sum for the buildings and improvements put by him upon the premises. Writ dated May 16, 1904.

In the Superior Court the case was submitted upon the following agreed statement of facts:

On March 21, 1854, the defendant, then the First Parish in North Bridgewater, executed and delivered to Winthrop S. Baker and Rufus P. Kingman, their executors, administrators and assigns, a lease of a vacant lot of land situated on the west side of Main Street in Brockton, owned by the parish and called the "Parish Green," for the period of fifty years from the date of the lease. A copy of the lease was annexed marked A.

Before the year 1904 Winthrop S. Baker died, and Fred Southworth was appointed administrator *de bonis non* of his estate. Also before the year 1904 Rufus P. Kingman died, leaving a will, and Fred B. Howard was appointed executor thereof.

On March 15, 1904, Fred B. Howard, executor of the will of Rufus P. Kingman, and Fred Southworth, administrator *de bonis non* of the estate of Winthrop S. Baker, assigned to Peter F. Hollywood, the plaintiffs' testator, his executors, administrators and assigns, the following described portion of the

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hereditaments and premises comprised in and demised by said lease from the defendant:

"A certain lot of land on the West side of Main Street in said Brockton, bounded North by land occupied by the First Parish in Brockton, East by Main Street, South by Green Street and West by land occupied by L. W. Puffer. The West line of the above described lot being eighty (80) feet Westerly from Main Street."

A copy of the assignment was annexed marked B.

For more than thirty years before March 15, 1904, the date of the assignment of the lease to Peter F. Hollywood, he had been sublessee under Baker and Kingman for a time equal to the remainder of the term of the original lease, and had built upon the premises a building the fair value of which, in connection with the land, at the time of the expiration of the lease was $3,267.98, and $100 in case the building should be removed.

The demised premises are situated on the principal business street in Brockton, in the centre of the business part of the city. They are nearly rectangular in shape, measuring about twenty-seven feet on Main Street and eighty feet on Green Street.

The lease was written by Benjamin Kingman, the chairman of the parish committee and the first signer in its behalf, who was not a lawyer.

In April, 1895, Peter F. Hollywood paid the sewerage assessment, amounting to $17.68, made by the city of Brockton on the demised premises, and received from the defendant an agreement that the amount of the assessment on the demised premises should be repaid to Hollywood, his heirs or assigns, at the termination of his lease in 1904, it being considered a permanent improvement.

On March 19, 1904, Hollywood notified the defendant that he had the assignment mentioned above of a portion of the premises described in the original lease, and requested the defendant to extend the lease to him for a reasonable time, and on reasonable terms, or to pay him a just and reasonable sum for the buildings and improvements which he had put on the premises.

The defendant refused to extend the lease, or to pay to Hollywood any sum for buildings and improvements which had been erected on the premises.

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On March 28, 1904, Hollywood died, leaving a will, and the plaintiffs were appointed executors of his will.

The court may draw any necessary inferences of fact from the facts stated.

The copy of the lease marked A was as follows:

"This Indenture, made this twenty-first day of March in the year one thousand eight hundred and fifty-four, by and between the First Parish in North Bridgewater (a religious society duly incorporated by the Commonwealth of Massachusetts) of the first part, and Winthrop S. Baker, of Yarmouth, in the County of Barnstable, Gentleman, and Rufus P. Kingman, of North Bridgewater, Merchant, of the second part.

"Witnesseth, That the said Parish doth hereby (by their Committee duly authorized) lease, demise and let unto said Baker and Kingman to them and their respective heirs, executors, administrators and assigns, the following described lot of land with all the privileges and appurtenances to the same belonging, to them the said Baker and Kingman and their heirs and assigns, to hold for the term of Fifty years from the date hereof, the same being situated in North Bridgewater, being the Southerly portion of a lot of land owned by said Parish, and called the Parish Green, bounded, beginning at the Southeast corner of said Green on the West side of Main Street; thence Northerly in a line of said Street about one hundred and seventy-four feet, to a station; thence Northwesterly on such a course as will in running fifteen feet intersect a line that is run parallel with and thirteen feet eight inches North from the North side of the old meeting house now standing thereon, and which old house is this day sold by said Parish to said Baker and Kingman for the sum of Twelve Hundred Twenty-six Dollars and Sixty cents as per said Parish Bill of Sale to them will appear; thence North eighty-five degrees West one hundred and eighty feet to a stake; thence North five degrees East thirty feet to a stake; thence North eighty-five degrees West forty-nine feet six inches to the West line of said Parish lot; thence Southerly in the West line of said lot about one hundred and ninety-two feet to the Southwest corner of said Parish lot; thence Easterly in the South line of said lot about two hundred feet to the bounds first named. And the said Parish for themselves and their succes-

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sors do further covenant to and with the said Baker and Kingman, their heirs and assigns that they, the said lessees, shall have a right of way from the Westerly part of said leased land to and from Main Street over the land between the old and new meeting house. And the said Parish hereby reserve to their own use and benefit the following described portion of the above described lot being that part on which the parsonage house and barn now stand, bounded, beginning at said road in the range of a line run parallel with and three feet North from the North side of said Parsonage house one hundred and ten feet to a stake; thence South seven degrees West fifty-eight feet to a stake; thence South eighty-three degrees East one hundred and eighty feet to said road; thence Northerly by the road fifty-eight feet to the first named reserved line. And the said Parish also reserve to the owners such sheds as now stand upon said leased lot which sheds are to be removed therefrom within a reasonable time. And the said Parish for themselves and their successors and assigns do hereby covenant to and with the said Baker and Kingman and their heirs and assigns, that the said Parish is lawfully seized and possessed of said premises, that they are free from all incumbrances and reserves except as above reserved, and that they have good right to lease the same as aforesaid to the said Baker and Kingman and that the said Parish will Warrant and Defend the free use and occupancy of said premises during the term of this lease to the said lessees, and their heirs and assigns together with the appurtenances to the same belonging to be used and occupied as they, the said Baker and Kingman may deem proper.

"And the said Parish further agrees and covenants to and with the said Baker and Kingman, their heirs and assigns that when this lease shall have terminated they, the said Parish or their successors will then extend the lease thereof to the said Baker and Kingman or their heirs and assigns on reasonable terms for a reasonable time, or pay to them, the said Baker and Kingman and their heirs or assigns a just and reasonable sum for such buildings and improvements as they, the said lessees may have put thereon.

"And the said Winthrop S. Baker and Rufus P. Kingman, their heirs, executors, administrators and assigns do hereby

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covenant to and with the said Parish and their successors that they will pay to said Parish or their successors the sum of one hundred dollars annually at the end of each and every year, and all taxes that may be lawfully assessed thereon. Commencing to estimate rent of said lot from first of November next, making the first rent fall due on the first day of November, which will be in eighteen hundred and fifty-five and so at the end of each and every succeeding year, until this lease shall expire by the terms thereof, or shall be otherwise cancelled by the mutual agreement of the parties. And now the respective parties hereto each for themselves, their successors, heirs and assigns do mutually promise each to the other well and truly to keep and perform all the covenants and agreements aforesaid according to the true intent and meaning thereof."

Here followed the attesting clause and the signatures and seals of the parties.

The copy of the assignment marked B was as follows:

"This Indenture, made the fifteenth day of March A. D. 1904 between Fred B. Howard, of Brockton, in the Commonwealth of Massachusetts, Executor of the Will of Rufus P. Kingman and Fred Southworth, of said Brockton, Administrator *de bonis non* of the estate of Winthrop S. Baker, parties of the first part, and Peter F. Hollywood, of said Brockton, party of the second part:

"Witnesseth: That in consideration of one dollar paid by the party of the second part to the party of the first part, the receipt whereof is hereby acknowledged, they, the said Fred B. Howard, as such Executor, as aforesaid, and the said Fred Southworth, as such Administrator, as aforesaid, do hereby assign unto the said Peter F. Hollywood, his executors, administrators and assigns, the following described portion of the hereditaments and premises comprised in and demised by a certain written lease from the First Parish in North Bridgewater to Winthrop S. Baker and Rufus P. Kingman, dated the twenty-first day of March, in the year one thousand eight hundred and fifty-four and recorded with Plymouth Deeds, Book 264, Page 31, of certain lands situate on the West side of Main Street, in said Brockton: said portion of the premises is described as follows:

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"A certain lot of land on the West side of Main Street, in said Brockton, bounded North by land occupied by the First Parish in said Brockton, East by Main Street, South by Green Street, and West by land occupied by Loring W. Puffer. The West line of the above described lot being eighty (80) feet Westerly from Main Street.

"To Have and to Hold the same unto the said Peter F. Hollywood, his executors, administrators and assigns henceforth for the residue of the term of fifty (50) years granted by said lease at the rent thereby reserved and subject to the covenants by the Lessees and conditions therein contained and henceforth to be performed and observed."

Here followed the attesting clause and the signatures and seals of Howard, executor, and Southworth, administrator *de bonis non* as above described.

The Superior Court gave judgment for the defendant; and the plaintiffs appealed.

W. A. Reed & R. W. Nutter, for the plaintiffs.

F. M. Bixby, for the defendant.

LORING, J. It is stated in the agreed statement of facts that the lease made in 1854 by the First Parish in North Bridgewater was a lease "of a vacant lot of land." But it appears from the lease, a copy of which is annexed to the agreed facts, that the land leased was "the southerly portion of a lot of land owned by said Parish, and called the Parish Green," and that "the old meeting-house now standing thereon" was "sold by said Parish" to the lessees for $1,226.60. These provisions of the lease contradict and control this statement in the agreed statement of facts.

The building here in question was erected by Hollywood, who appears to have been in possession at that time as an assignee of the lease of the portion of the land demised. It is stated in the agreed facts that he was then a sublessee "for a time equal to the remainder of the term of the original lease." We do not see how under these circumstances Hollywood could have been a subtenant.

One who acquires the whole estate of a lessee in a portion of the land covered by the lease is an assignee and not a subtenant. *Daniels* v. *Richardson*, 22 Pick. 565. *Congham* v. *King*, Cro.

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Car. 221, 222; *S. C. sub nomine Conham* v. *Kinge*, 1 Roll. Abr. 522, and *sub nomine Conan* v. *Kemise*, Jones, 245. *Wollaston* v. *Hakewill*, 3 M. & G. 297. *Cook* v. *Jones*, 96 Ky. 283. See also the cases collected in 18 Am. & Eng. Encyc. of Law, (2d ed.) 657, note 1.

But if Hollywood was a subtenant when he erected the building here in question, he became on March 15, 1904, an assignee of the lease so far as that portion of the demised land was concerned on which the building in question was erected, and the lease did not expire until March 21, 1904.

The covenant sued on has to do with the termination of the original lease, and in our opinion it is a covenant to pay to the lessees and their assignees on the termination of the lease (in case the lease is not extended as therein provided) "a just and reasonable sum for" any buildings and improvements which may have been put on the demised land during the term of the lease. The defendant has argued that the covenant is to be restricted to buildings put upon the land by the lessees and does not include buildings put upon it by subtenants or assignees of the lessees. We can conceive of no possible reason for such a discrimination having been made by the parties to the lease, and we think that such a construction is too narrow a construction of the word "lessees." If that were the true construction of the word "lessees" here, the covenant in question in the earlier part of the lease that "the said lessees shall have a right of way," and the covenant to "warrant and defend the free use and occupancy of said premises . . . as they, the said Baker and Kingman may deem proper," would have to be restricted in the same way. On the other hand the lease is a lease to "said Baker and Kingman to them and their respective heirs, executors, administrators and assigns," and the covenant in question is in terms a covenant "with the said Baker and Kingman, their heirs and assigns."

The defendant has argued that this covenant does not run with the land, relying on the second resolution in *Spencer's case*, 5 Coke, 16 a, b, in support of that contention. But the covenant is with the lessees and their assigns, as we have just said, and for that reason it does run with the land within the rule laid down in the second resolution in *Spencer's case;* and it is

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not necessary to consider *Minshull* v. *Oakes*, 2 H. & N. 793; *Gorton* v. *Gregory*, 3 B. & S. 90; *Elliott* v. *Johnson*, 8 B. & S. 38; *Stockett* v. *Howard*, 34 Md. 121.

The defendant has argued that to require the parish to pay for this building is to divert its funds from the corporate purposes to which they are devoted.

But that is not a fair statement of the question of *ultra vires* which we have here. The question of *ultra vires* in the case at bar is this: Where a parish has no further use for an old meeting house and the land on which it stands, abutting on a business street, is it *ultra vires* to let the land to a lessee who agrees to buy the meeting house which has been superseded, the parish agreeing to pay on the termination of the lease "a just and reasonable sum for such buildings and improvements" as are put upon the land during the lease?

We are of opinion that such a lease is not *ultra vires*. The case comes within the class of cases referred to in *Davis* v. *Old Colony Railroad*, 131 Mass. 258, at p. 272: "Thus a corporation may let or mortgage property lawfully held by it under its charter, and not immediately needed for its own business. *Simpson* v. *Westminster Hotel Co.* 8 H. L. Cas. 712. *Brown* v. *Winnisimmet Co.* 11 Allen, 326. *Hendee* v. *Pemberton*, 14 Allen, 381."

As the case must stand for further proceedings, it is proper to add that in our opinion the plaintiffs are entitled to the sum of $3,267.98, stated in the agreed facts.

Judgment reversed.

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WILLIAM ROBERTS *vs.* WILLARD WELSH.
SAME *vs.* SAME.
HARRY B. YOUNG *vs.* WILLIAM A. PARKER.

Middlesex. April 2, 1906. — June 19, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, BRALEY, & SHELDON, JJ.

Tax, Assessment, Valuation list, Collector's deed. *Deed. Words*, "About."

Under St. 1889, c. 84, (R. L. c. 12, § 15, St. 1902, c. 113,) an assessment of a tax on real estate to one holding under a tax deed which is regular on its face and is duly recorded is made to the right person, whether his title is valid or not.

The description of real estate in the valuation list kept by the assessors under the statutes now contained in R. L. c. 12, §§ 56–66, need not have the accuracy required for a conveyance. It is sufficient if it fairly designates the property for the information of those interested.

A description of real estate in the valuation list kept by the assessors of a city under the requirements of the statutes is sufficient if it gives the number of the house, the designation of the lot on which it stands and the number of square feet in the lot.

A description of real estate in a tax deed which is correct except in the use of the word "about" before two of the measurements which are in fact exact is not rendered uncertain or incorrect by the use of this word.

Where the word "about" is used in a deed in connection with a correct statement of distance it is treated as having no effect.

A description of real estate in a tax deed giving the front line of a lot on a city street as "about sixty-three feet" and giving the point of beginning as "about one hundred and twelve feet" from another street, whereas the lot taxed and intended to be sold was sixty-five feet wide on the street and the point of beginning was one hundred and ten feet from the other street, makes the sale invalid and the deed void, the collector having no authority to sell less than the whole of the lot.

THREE BILLS IN EQUITY, filed in the Superior Court on May 31, 1904, June 9, 1904, and January 23, 1905, each to remove an alleged cloud from the plaintiff's title to certain real estate on Jerome Street in that part of Medford called West Medford, as set forth in the first paragraph of the opinion.

In the Superior Court the cases were heard by *Sherman*, J., who reported each of them for determination by this court, such decree to be entered in each case as law and justice might require.

N. D. A. Clarke, for the plaintiffs.

J. Bennett & W. A. Parker, for the defendants.

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KNOWLTON, C. J. These are three bills in equity, each brought to remove a cloud from the plaintiff's title to certain real estate, caused by a deed from the collector of taxes, held by the defendant. In each case the title of the plaintiff is admitted, except so far as it is affected by the sale for non-payment of taxes under which the defendant claims. There were three separate sales, for the taxes of three different years, namely, 1900, 1901 and 1902. In the first suit the defendant claims under the sale for the non-payment of the taxes of 1900, in the second under the sale to collect the tax of 1901, and in the third under the sale to collect the tax for the next year. The only questions before us relate to the validity of the deeds made in pursuance of these three sales. In each case the deed is attacked on three grounds, and in each case the plaintiff contends, first, that the tax, on account of which the sale was made, was invalid because the property was assessed to the wrong person, secondly, that it was invalid because there was not a sufficient description of the property in the valuation list, and thirdly, that the description in the deed is incorrect and insufficient. In all other particulars it is conceded by the plaintiffs that the proceedings under which the defendants claim were regular.

1. Were the several assessments made to the right person? In each year the tax was assessed to Willard Welsh as owner. On the first day of May in each year he held a title to the property under two deeds previously made to him by the collector, on sales of the property for non-payment of taxes. These deeds were in proper form and had been duly recorded. No contention has been made that, on their face, they fail to show a valid tax title in the grantee named in them. It is said that on proper proceedings each of them has been held invalid by a court of competent jurisdiction, on account of errors, as we suppose, in the previous assessment. The question is therefore presented, whether one holding such a deed duly recorded, which purports on its face to be regular and valid, is included in the language, "persons appearing in the records of the county where the real estate lies as owners thereof," within the meaning of these words in the St. 1889, c. 84, § 1, (R. L. c. 12, § 15, St. 1902, c. 113.) We are of opinion that he is. In *Butler* v. *Stark*, 139 Mass. 19, it is decided that a title of record under a tax deed, which is

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subject to a right of redemption, makes the holder a "person appearing of record as owner," within the Pub. Sts. c. 11, § 13. This case is decisive of the question before us. The statute does not put upon the assessors the burden of inquiring into the validity of titles which appear of record to be good.

2. The description of the property in the valuation list was sufficient. It is not intended that such a description should necessarily be accurate in detail for the purpose of a conveyance. It is enough if it fairly designates, for the information of those interested, the property intended to be taxed. *Bemis* v. *Caldwell*, 143 Mass. 299. *Tobey* v. *Wareham*, 2 Allen, 594. *Westhampton* v. *Searle*, 127 Mass. 502. Some of the requirements of the statute as to the classification of property in the assessment list are intended to furnish information for the public authorities in reference to the equalization of taxation among the cities and towns of the State, and a disregard of them is not fatal to the validity of the tax. *Westhampton* v. *Searle*, *ubi supra*. *Torrey* v. *Millbury*, 21 Pick. 64, 67.

In the present cases the reference to the house by number, the designation of the lot, and the statement of the number of square feet in it were a sufficient description for the valuation list.

3. The next question relates to the description in the deeds under which the defendants claim. In two of these deeds the descriptions are the same. They are accurate, except in one particular. In fixing the boundary line between the land conveyed and the land next south of it the deed starts at a point on Jerome Street "about one hundred and ten feet" from Hawthorne Street, and it gives the last course and distance returning to this point as "thence southerly on Jerome Street about sixty-five feet." In fact the point was exactly one hundred and ten feet from Hawthorne Street and sixty-five feet from lot number thirty-eight. If the word "about" had been omitted, the description would have been perfect; but where this word is used in connection with a statement of distance, it is treated as leaving the statement unaffected by it if there is nothing to show that it is not exactly correct. As the measurement from the fixed point in each direction corresponds with the figures given in the deed, and as the area stated also corresponds with the directions and distances, we think the use of the word "about"

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does not create any uncertainty in the description in these two deeds, and that in these two cases the deed of the collector is valid.

In the third case, that of Young against Parker, the description differs from that already considered by giving the distance from Hawthorne Street as about one hundred and twelve feet, and the distance from lot thirty-eight as about sixty-three feet. If we treat the word "about" as we treated it in the other two deeds, it would fix the southerly line of the lot two feet further north than the true line, and would create a discrepancy between the dimensions and the area stated in the deed, and a like discrepancy between the deed and the statement in the valuation list. We cannot doubt, in view of the description in the valuation list and of the title of Willard Welsh then shown of record, that the land taxed was the lot sixty-five feet wide across the front extending to a line one hundred and ten feet from Hawthorne Street. This deed conveys only a part of that lot. At such a sale the collector was required by the statute to sell either the whole land taxed or an undivided part of it. R. L. c. 13, § 41. Therefore, his sale by metes and bounds of a part of the lot was invalid. In this case there should be a decree for the plaintiff. In the other two cases the bills will be dismissed.

So ordered.

ALVAH N. DOW *vs.* CHARLES F. BULFINCH.

Essex. May 15, 1906. — June 19, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Evidence. Practice, Civil, Conduct of trial. *Alienation of Affection.*

Whether evidence of experiments shall be admitted at a trial must be left largely to the discretion of the presiding judge, the exercise of which will not be interfered with unless it appears clearly to be wrong.

In an action by the tenant of a tenement in a building against the owner of the building, for alienation of the affection of the plaintiff's wife by debauching and carnally knowing her, a woman who lived in a tenement above that of the plaintiff testified that when on her knees dusting around the heaters in the room over

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the plaintiff's bedroom, where there was a board loose and a large opening at the steam pipes and the partition was thin, she heard in the room below the plaintiff's wife and the defendant use terms of endearment toward each other and heard a noise "either like patting or kissing." Another witness who occupied the tenement adjoining that of the plaintiff on the same floor, testified that a number of times when in a bathroom separated by a partition from the bathroom of the plaintiff's tenement she heard the plaintiff's wife and the defendant in the bathroom of the plaintiff's tenement. The defendant called witnesses who after this testimony was given, and eight years after the occurrences to which the witnesses had testified, had made experiments for the purpose of ascertaining whether or not sounds and conversations in the room below, formerly occupied by the plaintiff and his wife, could be heard in the rooms above, as testified to by the first witness, and whether or not voices in the bathroom of the plaintiff's tenement could be heard in the tenement occupied by the other witness. The judge excluded evidence of the experiments, but said that he would allow the defendant to show how the floors were constructed and the space between the ceiling of one room and the floor above it, and any details he wished to go into. *Held*, that the court could not say that the exclusion of the evidence of the experiments by the judge was clearly wrong, and therefore that this exercise of his discretion would not be interfered with.

In an action by the tenant of a tenement in a building against the owner of the building for alienation of the affection of the plaintiff's wife by debauching and carnally knowing her, the testimony of a woman who lived in the tenement above that of the plaintiff that on one occasion just after she had heard the defendant's voice in the plaintiff's tenement, she heard some one come out of that tenement and go downstairs to one of the entrances of the building as the plaintiff was coming up from a different entrance of the building, is admissible and its weight is for the jury.

In an action by the tenant of a tenement in a building against the owner of the building for alienation of the affection of the plaintiff's wife by debauching and carnally knowing her, there was evidence tending to show, among other things, that, when the plaintiff was not present the defendant was accustomed to visit the plaintiff's tenement two or three times a week in the forenoon and once or twice a week in the afternoon, that the visits in the forenoon lasted from fifteen minutes to an hour and those in the afternoon from fifteen minutes to all the afternoon, and that as a rule after the defendant entered the tenement the door was locked. Against the exception of the defendant, the plaintiff's mother was allowed to testify that upon one occasion she found the door of the plaintiff's tenement locked with the key on the inside, and "rattled the door very loudly" and heard voices inside, and that one was the voice of a man. *Held*, that although this testimony standing by itself might have been of little, if any, weight, the jury properly might consider it in connection with the other testimony.

TORT for the alienation of the affection of the plaintiff's wife, with two counts, the first alleging that the defendant on various days and times between August 1, 1896, and the date of the writ, intending to alienate and destroy the affections of the plaintiff's wife, wrongfully and wickedly debauched and carnally knew her, whereby her affection for the plaintiff was wholly alienated and

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destroyed, and the plaintiff wholly lost the comfort of her society, aid and assistance; and the second count alleging that the defendant persuaded, procured and enticed the plaintiff's wife to leave his house and to continue absent therefrom. Writ dated July 21, 1902.

At the trial in the Superior Court before *Aiken*, C. J. the plaintiff discontinued as to his second count, and the case was submitted to the jury on the first count. The jury returned a verdict for the plaintiff in the sum of $6,000; and the defendant alleged exceptions, raising the questions as to the exclusion and admission of evidence which are stated in the opinion.

W. H. Niles & H. R. Mayo, for the defendant.

J. H. Sisk, W. E. Sisk & R. L. Sisk, for the plaintiff.

HAMMOND, J. This is an action in which the plaintiff seeks to recover damages for the alienation of his wife's affections by the defendant. The trial was upon the first count in the declaration which alleged that the defendant at various times between August 1, 1896, and July 21, 1902, intending to alienate and destroy the affection of the plaintiff's wife, wrongfully and wickedly debauched and carnally knew her, by means whereof her affection for the plaintiff was wholly alienated, etc.

The defendant, before August, 1896, had built a block, the first floor of which was divided into stores, "the second floor into two tenements, each of which contained five rooms and a bathroom, and a common hall dividing both tenements." The third floor was a duplicate of the second. The plaintiff with his wife occupied a tenement on the second floor from August 1, 1896, to May, 1902. The evidence tended to show that, beginning shortly after the plaintiff moved into this tenement, the defendant "was accustomed to visit" there "two or three times a week in the forenoon, and one or two times a week in the afternoon, and that this continued substantially down to the time the plaintiff ceased to live in the defendant's block"; that the plaintiff was not present; that the visits in the forenoon lasted "from fifteen minutes to one hour," and those in the afternoon "from fifteen minutes to all the afternoon"; and that, as a rule, after the defendant entered the tenement the door was locked. The plaintiff's wife was under thirty years of age, and the defendant, who was a druggist carrying on business a short distance from

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the block, was between forty and fifty years of age. The doors of the various tenements were generally kept locked.

1. One Burton, called by the plaintiff, testified that during four months in 1897 she lived with the family of one Thompson, who occupied the tenement on the third floor directly above the plaintiff's tenement; that the first time she heard the plaintiff's wife and the defendant together they were in the dining room of the plaintiff's tenement, and the witness heard "the click of glasses and a noise made as though they were stirring something in a pitcher with a spoon"; that she heard their voices but did not hear what they said. She further testified that at another time she heard them use terms of endearment toward each other, and heard also a noise "either like patting or kissing," she "could not tell which"; that at this time she was in a bedroom in Thompson's tenement, "dusting around the heaters"; that heating pipes came from the plaintiff's tenement to heat the rooms in the Thompson tenement. On cross-examination she testified that at the time she heard the language and noise she was on the floor "dusting the floor"; that "there was a loose board, there was a large opening at the steam pipes, and I was down dusting and fixing the place, and you could hear very plainly, and I heard it"; that she could not say whether there was an opening into the room below, "but the boards were up so that the partition was so thin between that I could hear plainly, and the space around the pipes was such that I could hear plainly"; that she did not have "her ear down" there, but was down on her knees and heard the sounds; that she listened after she heard a few words. It was subsequently shown that the room where the witness was at work dusting at the time of hearing the above conversation and noise was directly over the plaintiff's bedroom. The plaintiff testified that the collars on the steam pipes, which ran through his tenement to the one above, frequently dropped from their position. There was no other evidence in the case of words of endearment. There was evidence that this witness was hostile in her feelings towards the defendant.

One Palmer, a witness called by the plaintiff, who occupied a tenement upon the same floor with the plaintiff, testified to hearing the plaintiff's wife and the defendant in the bathroom of the plaintiff's tenement a number of times. It appeared that there

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was a partition between the two bathrooms, and that there was no opening, transom or window in the partition.

This evidence was given on September 9, 1905, and, to rebut it, the defendant offered to show that it was impossible to hear sounds and voices as testified to by these witnesses; and he called witnesses who had made experiments immediately after this testimony for the purpose of ascertaining "whether or not sounds and conversations in the room below formerly occupied by the plaintiff and his wife could be heard in the rooms above as testified to by Mrs. Burton, and whether or not voices in the bathroom connected with the plaintiff's tenement could be distinguished in the tenement occupied by the witness Palmer."

One of these witnesses was asked to describe these experiments. Upon the objection of the plaintiff the evidence as to the experiments was excluded. The defendant then offered to show that, the conditions being the same, it was impossible in these experiments to hear conversations, however loud, of persons in either of the rooms as testified to by Burton and Palmer. The presiding judge excluded the evidence of the experiments, but said that he would allow the defendant to show "how the floors were constructed and the space between the ceiling of one room and the floor above it, and any details which you may wish to go into," adding, "Experiments that are made I exclude."

The question upon this branch of the case is whether the exclusion of this evidence is error. It is to be noted that it nowhere appears that the opinion of any witness as to whether or not such sounds could be heard was excluded or even offered. Simmons, the builder, was not asked what his opinion was. The fact that he had made tests was admitted. He was not asked his opinion. He was the contractor who had built the block for the defendant, and may well be supposed to have an opinion as a builder on that question. The only thing excluded was the evidence offered to show in detail the nature of the experiments.

As has been frequently said, the question whether evidence of experiments shall be admitted must be largely left to the discretion of the trial judge, and that discretion will not be interfered with unless in its exercise he clearly appears to be wrong. The experiments were made nearly, if not quite, eight years

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after the occurrences to which Burton and Palmer testified. The conditions testified to by Burton were evidently somewhat peculiar. The judge may well have thought that the trial of the question whether the conditions were in all respects the same, what changes if any had taken place in the adjustment of the heaters, what was the relative situation of the persons making the test, and whether the surrounding noises, if any, were the same, would lead to an extended inquiry upon collateral matters which would be of no practical assistance to the jury, and that the more direct and logical course was to explain to the jury the exact physical situation at the time of the alleged occurrences and to leave it to their common knowledge whether under such a state of things the witnesses for the plaintiff were to be believed. While these remarks apply with greater force to the evidence of the witness Burton, they are applicable, though in a less degree, to the evidence of Palmer. We cannot say as matter of law that the exclusion of the evidence was clearly wrong. See *Commonwealth* v. *Tucker*, 189 Mass. 457, 477.

2. The evidence of Burton that she on one occasion heard some one come out of the plaintiff's tenement and go down stairs to the Chestnut Street entrance as the plaintiff was coming up at the Lewis Street entrance, just after she had heard the defendant's voice in the plaintiff's tenement, was rightly admitted. Its weight was for the jury.

3. And the same may be said of the testimony of the plaintiff's mother that upon one occasion she found the door of the plaintiff's tenement locked with the key on the inside, and "rattled the door very loudly," and heard voices inside, and that one was the voice of a man. This testimony standing by itself may have been of little, if any, weight, but the jury might properly consider it in connection with the other testimony.

Exceptions overruled.

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GERTRUDE T. TAYLOR *vs.* MAYOR AND ALDERMEN OF HAVERHILL & others.

Essex. January 4, 1906. — June 20, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, & SHELDON, JJ.

Tax, Sewer assessments. *Sewer*. *Municipal Corporations*. *Haverhill*.

Where an ordinance of a city other than Boston provides that sewer assessments within the territory of its sewer system "shall be by fixed, uniform rates based upon the estimated cost of all sewers therein, both according to the frontage of such estates on any street or way where a public sewer is constructed and according to the area of such estates within a fixed depth of one hundred and fifty feet from such street or way," and establishes such rates, if the mayor and aldermen of the city make a sewer assessment under this ordinance it is made under the authority conferred by § 5 of c. 49 of the Revised Laws and not under § 7 of that chapter, and there can be no question as to the portion of the land covered by the assessment, as it must cover the entire frontage on the street and extend back one hundred and fifty feet and no more.

R. L. c. 49, § 4, giving a right to revision by a jury to persons aggrieved by a sewer assessment imposed by the mayor and aldermen of a city or the sewer commissioners, selectmen or road commissioners of a town, applies to an assessment made by the mayor and aldermen of a city under an ordinance authorized by the provisions of § 5 of the same chapter, and also applies to an assessment made by the mayor and aldermen of a city under § 8 of the same chapter for benefits received from the construction of a sewer running through private lands and not in any street or way.

The mayor and aldermen of a city under R. L. c. 49, § 1, have power to construct a sewer running through private lands and not in any street or way and to make an assessment under § 8 of the same chapter for benefits received from its construction.

Where the mayor and aldermen of a city make a sewer assessment under R. L. c. 49, § 8, for benefits received from the construction of a sewer running through private lands, the owners of which have granted to the city the right to lay the sewer through their lands, and not running in any street or way, but in the order making the assessment it is declared to be made under a certain ordinance of the city relating to assessments for the construction of sewers in streets or ways, and providing for such assessment according to the frontage of the estates assessed on such street or way and according to the area of such estates within a fixed depth of one hundred and fifty feet from such street or way, although the assessment for the sewer through private lands is not made under the ordinance the reference to the ordinance indicates that a lot thus assessed embraces the whole front upon the strip conveyed to the city by its owner and extends back one hundred and fifty feet from that strip.

PETITION, filed in July, 1904, by Gertrude T. Taylor, a resident and taxpayer in the city of Haverhill, the owner of

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certain land with buildings thereon in that city bounded in part by Mill Street, by land of one Jones and by Lake Saltonstall, for a writ of certiorari to quash two sewer assessments as stated in the opinion, one an assessment of $264 for a sewer running through private lands of the petitioner and others, and the other an assessment of $200 for a sewer running through Mill Street.

The following extracts from the Revised Ordinances of the city of Haverhill were annexed to the petition as an exhibit:

"Sect. 5. The City Engineer shall make and prepare all needed plans and specifications for the construction of all sewers built under the provisions of this ordinance and shall prepare plans and profile of such sewers when so built, showing their location and depth in relation to the street lines and grades, which plans and profile shall be filed in the office of the City Clerk; after being so filed shall be deposited and kept in the office of the City Engineer, which shall be deemed a part of the City Clerk's office for the keeping of such plans.

"The City Engineer shall certify to the Board of Mayor and Aldermen for the purpose of assessments, the frontage and area of abutters on the street or way through which the sewer has been constructed, together with the amount certified to him by the Superintendent of Highways as the cost of constructing such sewer.

"Sect. 6. Assessments upon owners of estates within the territory of the sewer system heretofore adopted, shall be by fixed, uniform rates based upon the estimated average cost of all sewers therein, both according to the frontage of such estates on any street or way where a public sewer is constructed and according to the area of such estates within a fixed depth of 150 feet from such street or way.

"Assessments upon owners of estates without the territory of the sewer system heretofore adopted by the City of Haverhill, shall be by the same fixed, uniform rate, and assessed in like manner as the territory within. When such estates abut upon more than one street or way, assessments for frontage shall be made upon the shortest side of such street or way. Such estimated cost of all the sewers in said sewer system is hereby fixed at $2.16 per running foot, the same having been so found and

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determined. The said fixed uniform rates to be assessed upon estates is hereby established at 20 cents upon each foot of frontage on any street or way where a sewer is constructed, and four mills upon each square foot of area within said fixed depth of 150 feet from such street or way, the same having been found and determined to be 35 per centum of the estimated cost of all the sewers in said sewer system.

"Owners of estates or parts of estates not liable to assessment or not in fact assessed, shall pay for the use of common sewers for the disposal of their sewerage from such estates or parts of estate such reasonable sum as the Mayor and Aldermen may determine."

The order of the board of aldermen for the construction of the sewer running through private lands, which was called by the master "the first sewer" although considered last in the opinion, was as follows:

"In Board of Aldermen, August 28, 1902.

"Ordered:

"That the Superintendent of Highways be and hereby is authorized and directed to construct a sewer, as hereinafter specified, from the end of the present sewer at the junction of Summer and Mill Streets, through Mill Street and through private lands south and west of Lake Saltonstall, to a point in Mill Street, near the culvert leading to the said lake at its westerly end, a total distance of about Three Thousand Eight Hundred (3800) feet.

"And be it further ordered that the exact location of the said sewer, the grade of said sewer, the size, and materials of which the said sewer is to be constructed, the location of manholes, and of inlets for the admission of surface water, and the waste weir near the southerly end of the lake, shall be as indicated in a set of plans, profiles, etc. on file in the office of the City Engineer, dated March, 1902, and numbered 1654.

"And be it further ordered that the owners of the lands through which the said sewer shall be built, and the owners of lands abutting on highways through which said sewer shall be built, shall pay to the City of Haverhill assessments at the rates of twenty cents per foot frontage and four tenths of a cent per square foot of area as set forth in the Revised Ordinances

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of the City of Haverhill for all lands abutting upon said sewer which can be drained into said sewer but no assessment to be made upon any lands reserved for public purposes or upon any lands lying between the said sewer and Lake Saltonstall not exceeding fifty (50) feet in depth measured on a line running at right angles with said sewer to said Lake Saltonstall and it is further ordered that the said Superintendent of Highways shall certify to the City Engineer the cost of said sewer and the City Engineer is hereby instructed to hereafter certify to the Board of Mayor and Aldermen, for the purpose of assessments, the frontage and area of all lands abutting on said sewer or on the streets or ways through which said sewer is constructed together with the amount certified to him by the Superintendent of Highways as the cost of constructing said sewer.

"And be it further ordered that the cost of constructing said sewer shall not exceed the sum of ninety-seven hundred dollars, said cost to be charged to the appropriation for sewer construction."

Here followed a revocation of a previous order, and the attestation of the passage of the foregoing order by the board of aldermen and of its approval by the mayor.

The order for the construction of the Mill Street sewer was as follows:

"In Board of Aldermen, Nov. 20, 1902.

"Ordered:

"That the Superintendent of Highways be and hereby is authorized and directed to construct a sewer on Mill Street, from the regulator manhole south of the west end of Lake Saltonstall, southerly to a point near Arlington Square. The said sewer to be of ten inch pipe for a distance of about four hundred and fifty (450) feet, and of eight inch pipe for the remaining distance of about four hundred and fifty (450) feet, the cost of the said sewer not to exceed eight hundred (800) dollars, the same to be charged to the appropriation for sewers."

The orders and schedules of sewer assessment by which the assessments were apportioned to the several landowners began in case of both sewers as follows:

"Ordered: That the property and estates named in the following schedule be and are hereby severally charged and

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assessed in the amounts therein named, as a reasonable sum for the use of the common sewer, for the disposal of their sewage, as determined by the mayor and aldermen under the provisions of section 6 of the ordinance relating to sewers."

The case was referred to a master, who in his amended report found that the first or marginal sewer constructed on the shore of Lake Saltonstall was constructed wholly through private lands not abutting on any street or way; and as to the assessment of $200 levied for the construction of the sewer in Mill Street, found that it was levied under § 6 of the ordinances, printed above. He found as a fact, that, upon the facts stated in the respondents' answer, there was no such laches as to bar the remedy sought by the petitioner.

The case came on to be heard before *Sheldon*, J., who reserved it upon the petition, the return of the respondents, the amended report of the master and the exhibits for determination by the full court.

J. H. Pearl, for the petitioner.

E. S. Abbott, for the respondents.

HAMMOND, J. This is a petition for a writ of certiorari to quash two sewer assessments. One of the sewers runs through a public highway called Mill Street, and the other chiefly through private lands of the petitioner and others, who had granted to the city the right to lay the sewer through their lands. Various objections are urged by the petitioner against the validity of each of these assessments. We shall consider only those which have been argued upon the brief of the petitioner, and shall treat the others as waived.

1. As to the Mill Street sewer: The petitioner contends that the assessment was made under § 7 of c. 49 of the Revised Laws, and not under § 3, and that there is nothing to show over what part of the land that assessment extended. But by an inspection of the proceedings of the assessing board it clearly appears that the assessment was made under the sixth section of the city ordinances, and therefore under the authority conferred by § 5 of c. 49 of the Revised Laws, and not by § 7. And when the proceedings are read in connection with the ordinance there is no doubt as to the precise portion of the petitioner's land covered by the assessment. The lot embraces the whole front-

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age on the street and extends back one hundred and fifty feet and no more.

It is suggested by the petitioner that unless an opportunity for a hearing upon an appeal for an abatement is given the assessment would seem to be illegal and void because no hearing was granted to the petitioner. But we think that the provisions of c. 49, § 4, which grant an appeal, are applicable to this assessment.

2. As to the sewer running chiefly through private lands: This sewer was not built in any street or way, and therefore the provisions of the ordinance are not applicable so far as it runs through private lands. But the board had the power to construct the sewer, (R. L. c. 49, § 1,) and to make an assessment for the same under § 3 of the same chapter; and, although the certificate of the engineer seems to have followed the form prescribed by the ordinance in the case of a sewer located wholly in a public street, and although the master finds that "the computations for the assessments were made in accordance with the provisions" of the ordinance, still, in view of the answer of the board it must be assumed that the estate of the petitioner was fairly and equitably assessed upon the basis of benefit received by the construction of the sewer. Such an assessment, even if not authorized by the ordinances or by R. L. c. 49, § 5, was authorized under R. L. c. 49, § 3, and may properly stand as valid under the powers conferred by that section. The petition in this respect shows no good reason for writ of certiorari.

As in the case of the first sewer, so in this, there is a right to be heard on appeal, so that in that way the landowner proceeding in due time can always be heard before the assessment becomes finally fixed. R. L. c. 49, § 4.

We think also that it definitely enough appears upon what part of the estate the assessment is made for this sewer. The lot embraces the whole front upon the strip conveyed to the city by the petitioner, and extends back one hundred and fifty feet from that strip.

We do not see that justice requires that the petition should be granted.

Petition dismissed.

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EDWARD LENNON *vs.* PAUL N. GOODRICH & another.

Suffolk. January 8, 1906. — June 20, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, & SHELDON, JJ.

Negligence, Employer's liability.

It is not the duty of an employer, who sets a boy seventeen years of age at work to clean and polish a circular bicycle chain on a revolving brush attached to a simple machine, with which the boy is familiar although he does not know the number of revolutions of the brush per minute, to warn or instruct him of the danger that the chain being flexible may get caught in the brush and be wound around the brush and shaft.

A workman employed to clean and polish articles by means of a revolving brush attached to a simple machine assumes the obvious risk of an accident caused by a flexible object, such as a circular bicycle chain which he is cleaning, getting caught in the brush and wound around the brush and shaft.

MORTON, J. This is an action of tort to recover damages for personal injuries sustained by the plaintiff while in the defendants' employ and engaged in cleaning a bicycle chain on a brushing machine. The chain got caught in the brush and was wound around the revolving shaft carrying the plaintiff's hand with it. There was a verdict for the plaintiff and the case is here on report. If the ruling which the defendants requested, that the judge should direct a verdict for the defendants and which the judge refused, should have been given, then judgment is to be entered for the defendants. If this request was rightly refused but there was other error prejudicial to the defendants, then a new trial is to be granted. Otherwise judgment is to be entered on the verdict.

We think that the ruling was wrong and that there should be judgment for the defendants. The plaintiff was a boy of seventeen and upwards at the time of the accident and for aught that appears was of average intelligence. He had worked on the machine several months, and before that had been employed, with an interval between the two employments, in the same room, sweeping floors, doing chores and setting up emery wheels. The only ground on which he bases his right to recover is that the defendants or their foreman was negligent in not warning

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or instructing him as to the danger of the work that he was doing when injured. What he was engaged in doing was as already observed cleaning a bicycle chain. He had cleaned or polished such chains before. The only difference between those and the one he was cleaning at the time of the accident was that the ends of those were loose and that the ends of this were joined together, making a circular chain, and rendering it, as he contended, more liable to catch on the brush and cause injury to the workman. The machine itself was as simple as it well could be in construction. It consisted of "a large iron base coming up from the floor" with two arms through which a shaft ran, on one end of which was a pulley and on the other end of which was the brush. The plaintiff knew that the brush revolved very rapidly though not how rapidly, and had cleaned and polished a great variety of articles upon it during the time that he had been at work upon it. It is apparent from his testimony that for all practical purposes he had become entirely familiar with the machine, even though he did not know the precise number of revolutions which the brush made per minute. Whether he received any instruction or not when first set to work on the machine was in dispute. But from the experience which he had had, we think that the defendants were justified in assuming that he needed no further instruction when the circular bicycle chain was given him to clean and polish, and were not negligent in failing to warn or instruct him. The risk that the chain, being flexible, might get caught and wound round the brush and shaft was, we think, an obvious one which he must be held to have assumed. It is common knowledge that clothing or any other flexible article or material on coming in contact with a revolving pulley or shaft is liable to get caught and wound around it. We see no evidence of negligence on the part of the defendants or their superintendent or foreman. See *Tiffaney* v. *Hathaway*, 182 Mass. 431; *Smith* v. *Beaudry*, 175 Mass. 286; *Robinska* v. *Lyman Mills*, 174 Mass. 432; *Kenney* v. *Hingham Cordage Co.* 168 Mass. 278; *Stuart* v. *West End Street Railway*, 163 Mass. 391; *Pratt* v. *Prouty*, 153 Mass. 333; *Coullard* v. *Tecumseh Mills*, 151 Mass. 85; *Ciriack* v. *Merchants' Woollen Co.* 146 Mass. 182. It is not contended that there was any defect in the machine and the plaintiff's case is not put on that ground. The conclu-

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sion to which we have come on the main question renders it unnecessary to consider the questions of evidence.

Judgment for the defendants.

R. Spring, (*H. H. Atwood* with him,) for the defendants.

T. H. Dowd, for the plaintiff.

CORA A. HEBBLETHWAITE *vs.* OLD COLONY STREET RAILWAY COMPANY.

ALBERT E. HEBBLETHWAITE *vs.* SAME.

Norfolk. January 9, 10, 1906. — June 20, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, & SHELDON, JJ.

Negligence, Res ipsa loquitur. Street Railway.

If, in an action against a street railway company for personal injuries, there is evidence that the plaintiff was seated at about the middle of a box car of the defendant which was "going quite fast" when a "big crash" came and the car did not go any farther and a piece of iron came up through the wooden part of the seat between the cushions, that the plaintiff fell over on the iron and then swayed back and fell over on the other side on her right wrist and was injured, and if there is no evidence to show where the piece of iron came from and the defendant does not offer any explanation of the accident, there is evidence for the jury of negligence on the part of the defendant.

MORTON, J. These two actions were tried and argued together. The first is by a married woman to recover for injuries received by her through the defendant's negligence while a passenger in one of the defendant's cars. The other is by the husband to recover the amount paid for medical services and other expenses and for loss of consortium. There was a verdict for the plaintiff in each case. The cases are here on exceptions by the defendant to the refusal of the judge to rule that the plaintiffs were not entitled to recover, and that there was no evidence of negligence on the part of the defendant.

The female plaintiff's account of the accident was that she took a car between East Weymouth and South Weymouth, that it was a box car and the plaintiff was seated at about the middle of it, and after she had been riding six or seven minutes towards

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South Weymouth, the car which was going quite fast came to a sudden stop. "A big crash came and the car did not go any farther, and there was a piece of iron came up about a foot from her; that she fell over on to the piece of iron and then bounded back and came down on her right wrist, striking her left side and elbow; the piece of iron came up through the wooden part of the seat and between the cushions where they come together." She further testified that, "After the iron came up she fell over on to it; when the car gave this sudden jerk, she went over on to it; that she was thrown over on her side but not off the seat; . . . that next after she fell over on to the iron she swayed back and fell over on the other side on her right wrist." She was corroborated by one witness as to the rate at which the car was moving and as to its coming to a sudden stop. But she was contradicted by several witnesses called by the defendant as to her being thrown over on to the iron, or away from it, and was the only witness who so testified. All of the witnesses agreed, however, that a piece of iron came up through the seat, and that the car came to a stop, though all except the plaintiff and one other testified that it was moving slowly when it stopped. There was no evidence as to where the piece of iron came from.

Whether the account given by the female plaintiff of the way in which she received the alleged injuries was correct or not was clearly for the jury. And we think that it was also competent for them to find that the accident was due to negligence on the part of the defendant. The defendant did not offer or attempt to offer any explanation of the accident. The track and the car were under its control, and in the absence of any explanation tending to show that the accident occurred without any fault on its part the jury were warranted in finding that it would not have occurred if the defendant had exercised proper care. *White* v. *Boston & Albany Railroad*, 144 Mass. 404. *Feital* v. *Middlesex Railroad*, 109 Mass. 398. *Uggla* v. *West End Street Railway*, 160 Mass. 351. *Copithorne* v. *Hardy*, 173 Mass. 400. *Savage* v. *Marlborough Street Railway*, 186 Mass. 203.

Exceptions overruled.

Asa P. French, for the defendant.

F. P. Garland, for the plaintiffs.

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JOSEPH STONE *vs.* STREET COMMISSIONERS OF THE CITY OF BOSTON.

Suffolk. January 10, 1906. — June 20, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, & SHELDON, JJ.

Tax, Assessments for benefits. *Statute*, Repeal. *Boston*.

The right to levy betterment assessments exists only by statute and the Legislature may at any time suspend or repeal the law authorizing such assessments, either generally or in a particular case, except so far as obligations of contract are involved.

St. 1900, c. 296, § 1, authorizing the street commissioners of the city of Boston to lay out, widen and order the construction of the causeway and other parts of the highway between Malden Bridge and the boundary line between the city of Boston and the city of Everett, and providing that "no assessment shall be made for such laying out and construction," repealed by implication the law relating to betterment assessments in relation to the particular improvement authorized, and the repeal applies to relocation proceedings relating to the highway in question instituted before the passage of St. 1900, c. 296, including an order purporting to make assessments under St. 1891, c. 323, § 14, as amended by St. 1899, c. 433.

MORTON, J. This is a petition for a writ of certiorari to quash a betterment assessment made by the street commissioners of Boston upon the petitioner and others for benefits accruing from the relocation and construction of Alford Street in that part of Boston which was formerly Charlestown. The case was reserved by a single justice for determination by the full court.

There is no dispute as to the facts, or as to the remedy if the assessment is invalid. By St. 1899, c. 280, the city engineer of Boston was required to construct a bridge over Mystic River at or near the site of Malden Bridge so called, and the street commissioners were authorized to take in fee any lands which they might deem necessary to enable the city to carry out the act. On August 21, 1899, the street commissioners passed an order relocating Alford Street from the boundary line between Boston and Everett so as to pass over the bridge thus authorized. Subsequently the Legislature passed an act, St. 1900, c. 296, authorizing the board of street commissioners of the city of Boston to "lay out, widen and order the construction of so much of the causeway and other parts of the highway between

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Malden Bridge and the boundary line between said city and the city of Everett, and to such a width as the board may determine" and providing that the expenses should be paid from the loan authorized by St. 1899, c. 280, aforesaid, and that "no assessment shall be made for such laying out and construction." Substantially all of the work of constructing Alford Street was done after the passage of this act. On October 29, 1904, the street commissioners of the city of Boston, purporting to act under St. 1891, c. 323, § 14, as amended by St. 1899, c. 433, passed an order making the assessments in question. The petitioner contends that under the concluding clause of § 1 of St. 1900, c. 296, quoted above, the street commissioners had no authority to make the assessments. We are of opinion that the contention is right.

The right to levy and collect betterment assessments is wholly statutory in its nature and the Legislature may, at any time, for reasons which it deems satisfactory, suspend or repeal the law authorizing such assessments, except so far as contractual rights or obligations are involved. In the present case no contractual rights or obligations are involved. And we think it plain that the concluding clause of § 1 of St. 1900, c. 296, repealed by implication the law relating to betterment assessments so far as the particular improvement referred to in said act was concerned. It is immaterial that the repeal took place after the order for relocating the street had been adopted by the street commissioners and that the order for relocation did not purport to be made under c. 296. The city and the street commissioners were the agents of the Commonwealth and were at all times during the proceedings subject to its direction. This was equally true whether the relocation proceedings took place under St. 1900, c. 296, or under St. 1891, c. 323, § 14, as amended by St. 1899, c. 433. The statute referred to in *Jones* v. *Aldermen of Boston*, 104 Mass. 461, relied on by the respondents, expressly provided that the repeal should "not affect any rights or liabilities which have already accrued under the section hereby repealed."

The result is that the writ is to issue as prayed for.

So ordered.

F. M. Forbush, for the petitioner.

S. M. Child, for the respondents.

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EVELYN B. RANSOM *vs.* CITY OF BOSTON.

Suffolk. January 15, 1906. — June 20, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Veteran. Civil Service. Mandamus. Contract. Damages. Statute.

Under R. L. c. 19, §§ 23, 24, however it may be in other matters, in regard to the right to preference for continuous employment there is no distinction between a veteran who has been registered, certified and employed in the labor service of a city or town and a veteran who has been examined, registered and employed as a public officer.

Rules made by the civil service commissioners under R. L. c. 19, § 24, in regard to the preference of veterans, provided that "when laborers are required, the employing officer shall make requisition upon the commissioners, stating the number of men wanted, the precise nature of the labor in which they are to be employed and the time and place of employment," that "upon such notice, the commissioners shall certify the names of any and all veterans upon the eligible list, and the employment must be made from the list so certified," and that "the employing officer shall, before selecting or employing any other person, first employ from the list of veterans certified." *Held*, that under these rules a veteran employed in the labor service of a city or town has the right to continuous employment in preference to those laborers who are not veterans so long as there is work to be done of the kind for which he was employed and he is competent to perform it.

If a public officer *de jure* whose salary has been paid to an officer *de facto* must establish his right by mandamus before he can be given any pecuniary relief, this rule has no application to an action brought by a veteran against a city for refusing to continue to employ him as a laborer and employing other persons not veterans to his exclusion.

Where a veteran is employed by a city as a laborer under the terms of R. L. c. 19, §§ 23, 24, and of rules made by the civil service commissioners under the last named section, there is a contract between the veteran and the city in accordance with the provisions of the statute and the rules in regard to the terms of his employment, and if he is discharged or refused employment in violation of these provisions he may recover his damages in an action of contract.

In an action by a veteran who has been employed by a city as a laborer against the city for refusing to continue his employment and employing others, not veterans, to do work which he might have done, if the plaintiff proves his case the measure of his damages is the pay which he would have earned less what he earned or in the exercise of proper diligence might have earned elsewhere.

The fact, that R. L. c. 19, § 35, imposes a punishment by fine for a violation of the provisions of that chapter relating to the civil service or of the rules of the civil service commissioners made under those provisions, does not deprive a veteran employed by a city as a laborer of a right of action against the city for a breach of contract in failing to comply with the terms of such provisions and rules under which he was employed.

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SHELDON, J. This is an action of contract brought against the city of Boston to recover wages which the plaintiff would have received if he had been employed continuously by the defendant from May 6, 1895, to the date of his writ.

At the trial in the Superior Court it appeared that the plaintiff, being a veteran of the civil war within the meaning of the civil service statutes and rules, duly registered with the civil service commission in January, 1895, as a laborer for labor service in the city of Boston; that he was eligible for such labor service; that upon a requisition made to the civil service commission by the superintendent of the public grounds department of the defendant city, he was regularly certified for such service, and was employed as a laborer in that department. He worked in that employment steadily until January 1, 1898, when a foreman in that department told him he was suspended, and thereafter he was refused work except for ten days during which he was employed and worked as usual, until March 18, 1898, when he was employed and worked as before until January 30, 1899. After this he was again laid off or suspended from time to time during the winter and early spring, and was employed and worked the rest of the time until December 4, 1901, when by an accident he became incapacitated for work until about December 8, 1902. On this last date he was refused any employment or work, and from that time until the date of the writ he was prevented by the superintendent of the department and the foreman from doing any work. On March 1, 1903, he received notice that he was discharged by the defendant from his employment in the department for the reason that his name had not appeared upon the pay rolls as at work for six months preceding that date; but on March 26, 1903, the superintendent of public grounds was notified by the civil service commission that the plaintiff, being a veteran, was not to be discharged for that cause, and that his name was still on record at the office of the commission as an employee of the public grounds department.

There was evidence that the plaintiff was at all times, except from December, 1901, to December, 1902, able, ready and willing to work as a laborer in the department for which he was eligible, and that he habitually and frequently asked the

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superintendent and foreman to employ him; that when he was first laid off or suspended another man, not a veteran, was put to work in that department as a common laborer, and afterwards continued to perform work such as the plaintiff was accustomed to do, while the plaintiff was not permitted to work; that there was work done by persons not veterans classified as laborers while the plaintiff was laid off or suspended.

The work done by the plaintiff in the spring, summer and fall was hoeing, sweeping, mowing, loading teams and helping sodders and other laborers. The work done in the winter time was sweeping, shovelling off steps, shovelling snow and clearing the ponds of snow for skating. There was evidence that the force of men employed on the public grounds in the spring, summer and fall for such work as the plaintiff did was cut down during the winter, as there was then no such work to be done, but that certain laborers, not veterans, were employed during the winter months on work which the plaintiff was able and ready to perform. He never was removed or suspended from his employment on any charges preferred against him; and there was no evidence that he ever was removed or suspended after a full hearing before the mayor, or that the removals and suspensions were made upon the written order of the mayor.

Upon this evidence, at the end of the plaintiff's case, the presiding judge ruled that the action in contract could not be maintained, and, upon the general ground that upon all the evidence the plaintiff was not entitled to maintain the action, ordered a verdict for the defendant; and the case comes before us upon the plaintiff's exceptions to this ruling.

It is provided by R. L. c. 19, § 23, that "no veteran who holds an office or employment in the public service of the Commonwealth, or of any city or town therein, shall be removed or suspended, or shall, without his consent, be transferred from such office or employment, nor shall his office be abolished, except after a full hearing of which he shall have at least seventy-two hours' written notice, with a statement of the reasons for the contemplated removal, suspension, transfer or abolition. The hearing shall be before the State board of conciliation and arbitration, if the veteran is a State employee, or before the mayor of the city or selectmen of the town of which he is an

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employee, and the veteran shall have the right to be present and to be represented by counsel. Such removal, suspension or transfer, or such abolition of an office, shall be made only upon a written order stating fully and specifically the cause or causes therefor, and signed by said board, mayor or selectmen, after a hearing as aforesaid." The rules of the civil service commissioners made and duly approved under St. 1884, c. 320, § 2, and the acts in amendment thereof, (see now R. L. c. 19, §§ 6, 7, 24,) were put in evidence at the trial, and by agreement of the parties were produced and referred to at the argument in this court. The plaintiff contends that under these statutes and rules the defendant is obliged to employ the plaintiff so long as he is ready and able to perform the labor for which he was employed, until he shall have been discharged in the manner provided by the statute. The defendant does not deny that the statutes are now in full force, or that both the statutes and the rules of the civil service commissioners made under their authority are to be resorted to to ascertain the rights of the plaintiff; nor does the defendant now contend that it had the right to discharge the plaintiff in March, 1903, for the reason then assigned. "Any laborer suspended and not actually employed in the department in which he is enrolled shall at the end of six months be deemed to be out of the service, and shall not be thereafter employed, except after registration and certification by the commissioners; and the employing officer shall forthwith report to the commissioners the name of any laborer so suspended; provided, however, that this provision shall not apply to veterans." Civil Service Rules, Rule 47.

The defendant contends, however, that § 23 already cited does not apply to labor service; that labor service is regulated by § 24; that the effect of the statutes taken together is to draw a distinction between the official classified public service and the labor service of the Commonwealth and its cities or towns. The defendant's argument is that the provisions of the statute to be considered here are contained in R. L. c. 19, §§ 20–24, inclusive. Of these sections, § 20 defines the word "veteran." Section 21 allows a veteran to apply for examination under the rules, and gives him a preference over other applicants; and it is contended that this section cannot be made applicable to

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labor service, for which he is not to be examined. Section 23, which has been quoted above, provides in terms for "the public service." Section 24 is to the effect that the rules of the civil service commissioners "shall provide for the employment of veterans in the labor service of the Commonwealth and of the cities and towns thereof." And the defendant insists that the change of language from the words "public service" to "labor service" is upon its face significant of the intention of the Legislature to make the distinction contended for.

The original provision for the examination of applicants for appointment or employment under public authority was made by the St. 1884, c. 320. Section 16 of this chapter provided that "the examination of applicants for employment as laborers shall relate to their capacity for labor, their habits as to industry and sobriety, and the necessities of themselves and their families." In 1887, veterans of the war of the rebellion were given a preference in "appointment to office or employment in the service of the Commonwealth, or the cities thereof," without passing any examination under the act of 1884. St. 1887, c. 437. The St. 1889, c. 473, applied to "all cases of certification for appointment of examined persons," and provided that the veterans should be appointed in preference to other persons who had not a higher standing on the eligible list. St. 1894, c. 519, forbade the removal or suspension of any veteran who held "an office or position in the civil service of any city in the Commonwealth" except in the manner therein provided. St. 1895, c. 501, seems to have been intended chiefly to give to veterans an absolute preference in the public service, without any distinction between the right to appointment to office and employment in labor service. But in *Brown* v. *Russell*, 166 Mass. 14, it was held that §§ 2 and 6 of this statute, so far as they gave to veterans peculiar and exclusive privileges distinct from those of the community in obtaining public office, were unconstitutional, although it was intimated in the opinion that perhaps a different rule might be applied to cases of mere employment for the rendition of services which did not constitute the employee a public officer. The Legislature then enacted St. 1896, c. 517, embodying and repealing many of the previous acts, and containing substantially the provisions now

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set forth in R. L. c. 19, §§ 20–24. The sixth section of the statute of 1896 provided that the civil service commissioners should establish "rules to secure the employment of veterans in the labor service of the Commonwealth and of the cities and towns thereof, in the class for which they make application, in preference to all other persons, except women." See now R. L. c. 19, § 24.

If the distinction for which the defendant contends has any existence in our legislation, it was created by the statute just cited. But we have not found it necessary to determine this question; for we are of opinion that whether or not there is any difference between the plaintiff's rights and those of one employed in the classified public service, and whether or not there is any difference between the different branches of the public service, as to which questions we express no opinion, the exceptions in this action must be sustained. We see no valid distinction, at least as to the right to continued employment, between the case of a veteran who has been duly registered, certified and employed in the labor service of a city or town and the case of a veteran who has been duly examined, registered and employed as a public officer. See *Johnson* v. *Kimball*, 170 Mass. 58. The Legislature intended to provide as much in the former case as in the latter for the continuous employment of a veteran as long as he was able to do the work for which he was employed and the occasion for the work continued. The manifest purpose of the statute was to secure the employment of veterans in the labor service of the Commonwealth and its cities and towns in preference to all other persons except women, if the veterans are competent to perform the labor; and it was within the power of the Legislature to make this preference. *Opinion of the Justices*, 166 Mass. 589. And see *Shaw* v. *Marshalltown*, 131 Iowa, 128; *In re Sullivan*, 55 Hun, 285; *People* v. *Grout*, 90 N. Y. Supp. 122. The statute makes it the duty of the civil service commissioners to establish rules to accomplish this purpose; and these rules, when duly approved, have the force of law. *Attorney General* v. *Trehy*, 178 Mass. 186, 188. R. L. c. 19, § 7. In pursuance of the duty thus imposed upon them the commissioners have provided by rules duly approved that "when laborers are required, the

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employing officer shall make requisition upon the commissioners, stating the number of men wanted, the precise nature of the labor in which they are to be employed and the time and place of employment. Upon such notice, the commissioners shall certify the names of any and all veterans upon the eligible list, and the employment must be made from the list so certified." Rule 44. And again it is provided by Rule 45, that "the selection and employment shall be made from the list certified, and the employing officer shall, before selecting or employing any other person, first employ from the list of veterans certified." In view of the language of these rules and of the fact that they were passed under a statute which made it obligatory upon the commissioners to establish rules giving to veterans a preference in the labor service, they must be so construed as to accomplish that purpose and to give to the plaintiff the right to continuous employment in preference to those laborers who were not veterans, so long as there was work to be done of the kind for which he was employed, and as he was competent to perform that work.

But the defendant contends that, even if this be the case, yet the plaintiff had no contract with the city, was not employed for any definite time or at any fixed rate of pay or salary, and so cannot maintain an action to recover wages for work that he has not performed. *Chase* v. *Lowell*, 7 Gray, 33. *Knowles* v. *Boston*, 12 Gray, 339. *Donaghy* v. *Macy*, 167 Mass. 178. *Malcolm* v. *Boston*, 173 Mass. 312. *Love* v. *Mayor & Aldermen of Jersey City*, 11 Vroom, 456. *Conner* v. *Mayor & Aldermen of New York*, 1 Seld. 285. The argument is that a public officer cannot maintain an action for his salary unless he actually has exercised the office, especially if the salary has been paid to a *de facto* officer, and that he must at any rate establish his right by mandamus before he can be given any pecuniary relief, either against the person who has wrongfully held the office or against the city or town which pays the salary. See *Phillips* v. *Boston*, 150 Mass. 491, 498. There are many decisions in other States in which this doctrine has been upheld, and there are also strong decisions to the contrary. *Farrell* v. *Bridgeport*, 45 Conn. 191. *Conner* v. *Mayor & Aldermen of New York*, 1 Seld. 285. *Hadley* v. *Mayor & Aldermen of Albany*, 33 N. Y. 603. *Smith* v. *Mayor & Aldermen of New York*, 37 N. Y. 518.

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Dolan v. *Mayor & Aldermen of New York*, 68 N. Y. 274. *Kennedy* v. *Mayor & Aldermen of New York*, 79 N. Y. 361. *McVeany* v. *Mayor & Aldermen of New York*, 80 N. Y. 185. *Nichols* v. *MacLean*, 101 N. Y. 526. *Gregory* v. *Mayor & Aldermen of New York*, 113 N. Y. 416. *Hagan* v. *Brooklyn*, 126 N. Y. 643. *Martin* v. *New York*, 176 N. Y. 371. *Grieb* v. *Syracuse*, 94 App. Div. (N. Y.) 133. *Schuyler* v. *New York*, 95 App. Div. (N. Y.) 305. *State* v. *Mayor of Newark*, 29 Vroom, 12. *Luzerne County* v. *Trimmer*, 95 Penn. St. 97. *Hines* v. *District of Columbia*, MacArthur & Mackey, 141. *Frazier* v. *Virginia Military Institute*, 81 Va. 59. *Steubenville* v. *Culp*, 38 Ohio St. 18. *Glascock* v. *Lyons*, 20 Ind. 1. *County Commissioners* v. *Anderson*, 20 Kans. 298. *Selby* v. *Portland*, 14 Ore. 248. *Hunter* v. *Chandler*, 45 Mo. 452. *Sheridan* v. *St. Louis*, 183 Mo. 25. *Wheatly* v. *Covington*, 11 Bush, 18. *Gorley* v. *Louisville*, 108 Ky. 789. *Baxter* v. *Brooks*, 29 Ark. 173. *Michel* v. *New Orleans*, 32 La. Ann. 1094. *Scott* v. *Crump*, 106 Mich. 288. *Stadler* v. *Detroit*, 13 Mich. 346. *Shaw* v. *Macon*, 19 Ga. 468. *Mayor & Council of Macon* v. *Hays*, 25 Ga. 590. *Brunswick* v. *Fahm*, 60 Ga. 109. *Dorsey* v. *Smyth*, 28 Cal. 21. *Carroll* v. *Siebenthaler*, 37 Cal. 193. *Meredith* v. *Board of Supervisors*, 50 Cal. 433. *Bastrop County* v. *Hearn*, 70 Tex. 563. *Kendall* v. *Raybauld*, 13 Utah, 226. *Memphis* v. *Woodward*, 12 Heisk. 499. *Andrews* v. *Portland*, 79 Maine, 484.

But the case at bar differs from the cases dealt with in these decisions. The plaintiff was not the holder of a public office which had been usurped by another who was readily to be identified, and against whom a complete remedy was available. He was a laborer, a member of a gang. It ordinarily would be difficult and frequently impossible to identify the laborer who was doing the work that ought to have been given to the plaintiff. If he could identify the particular person who had been employed in his stead, it would be practically a denial of justice to say that his only remedy was by a suit for damages against another laborer, who presumably would have no means to satisfy a judgment. Such a limitation has been made in the case of public officers, to whom it usually could be applied without injustice; but we have found no decision in which it has been extended to such a case as this, and in our opinion

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it ought not to be so extended. *Houston* v. *Estes*, 35 Tex. Civ. App. 99. *Houston* v. *Clark*, 80 S. W. Rep. 1198.

Nor can it be said that there was no contract between the parties. *Dolan* v. *Orange*, 41 Vroom, 106. *Farwell* v. *Rockland*, 62 Maine, 296. The contract of employment must be deemed to have been made in view of the statutes regulating the employment of laborers by towns and cities. The statutes and the rules of the civil service commissioners entered into the contract and constituted a part of the terms of his employment. For any breach of these terms of employment he may recover in an action of contract. This point was expressly decided in *United States* v. *Wickersham*, 201 U. S. 390, citing *Emmitt* v. *Mayor & Aldermen of New York*, 128 N. Y. 117, and *Lellmann* v. *United States*, 37 Ct. of Cl. 128.

We do not mean to intimate that the plaintiff is necessarily entitled to recover the full amount which he has claimed. There was evidence that, for a part of the time at least during which work was refused him, he acquiesced in the refusal, and that at other times there was no work to be done such as he had been employed for and was able to perform. *Norton* v. *Brookline*, 181 Mass. 360. *Clark* v. *Boston*, 179 Mass. 409. The only liability of the city is for not having given him the preference over others, not veterans, to which he was entitled while there was such work to be done. If, as the jury might have found on the evidence, the city failed to do this, then he was entitled to recover; and, as in the ordinary case of a breach of a contract of employment, the measure of damages would be determined by the pay he would have earned, less what he earned, or in the exercise of proper diligence might have earned, elsewhere. The fact that the statute imposes a penalty for any breach of its provisions, (R. L. c. 19, § 35,) does not deprive the plaintiff of his civil remedy. *Parker* v. *Barnard*, 135 Mass. 116. The case should have been submitted to the jury.

Exceptions sustained.

The case was argued at the bar in January, 1906, before *Knowlton*, C. J., *Morton*, *Lathrop*, *Hammond*, & *Sheldon*, JJ., and afterwards was submitted on briefs to all the justices.

J. K. Berry, for the plaintiff.

P. Nichols, for the defendant.

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JOHN S. WOODALL *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. January 16, 17, 1906. — June 20, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, & SHELDON, JJ.

Negligence. Elevated Railway. Evidence, Circumstantial. *Boston Elevated Railway Company.*

In an action against a corporation operating an elevated railway for an injury from a particle of metal thrown out in the operation of the railway getting into the plaintiff's eye while he was crossing a street under the elevated structure as a train was passing overhead, the fact that the plaintiff crossed the street under the moving train shows no lack of ordinary care on his part.

In an action against a corporation operating an elevated railway for an injury from a particle of metal thrown out in the operation of the railway getting into the plaintiff's eye while he was crossing the street under the elevated structure as a train was passing overhead, the jury in answer to a question from the judge found that the piece of metal in the plaintiff's eye came from the operation of the contact shoe. The plaintiff testified that he was going under the structure and heard the noise of a train passing overhead and then the particle got in his eye. There was evidence that sparks frequently had been seen to fall in the general vicinity of the place of the accident when trains were in motion and that they sometimes fell in showers and reached the pavement. There also was evidence that the injury was caused by a particle of metal and not by a cinder, that there was a burn on the plaintiff's eye and that the particles thrown off by the contact shoe were hotter than those from the brake shoe, and also that the train was going in a direction where owing to the position of the stations there would have been no occasion to apply the brakes. There also was evidence tending to show that, although there had been a good deal of trouble from the sparking of the contact shoes, there had been no difficulty and no accidents to persons underneath by reason of sparks from the brake shoes. *Held,* that there was evidence warranting the finding of the jury.

In an action against a corporation operating an elevated railway for an injury from a particle of metal thrown out in the operation of the railway getting into the plaintiff's eye while he was crossing the street under the elevated structure as a train was passing overhead, if no one saw where the particle of metal came from and the plaintiff contends that it was thrown off by the contact shoe and that the defendant was negligent in failing to provide an appliance for preventing the falling of such particles upon the street below, the plaintiff is not bound to exclude the possibility of the accident having occurred in some other way, but only to satisfy the jury by a fair preponderance of evidence that the accident occurred in the manner in which he contends that it did.

In an action against the Boston Elevated Railway Company for an injury from a particle of metal thrown out in the operation of its elevated railway getting into the plaintiff's eye while he was crossing a street under the elevated structure as a train was passing overhead, in which the jury found on evidence warranting such a finding that the particle of metal came from the operation of the contact

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shoe, the jury also found that the defendant was negligent in failing to apply to the railroad commissioners for the approval of a pan to prevent the falling of such particles on persons below. St. 1894, c. 548, and St. 1897, c. 500, required the railroad commissioners to approve the plans for the railway before it could be constructed, and, after the completion of the whole or a part of it, required a certificate from them that it appeared to be in a safe condition for operation before the corporation could operate it. The commissioners approved the plan for the railway and gave the certificate for operation after it was constructed. There was evidence that after the operation of the railway began it was known that there was a good deal of trouble from the throwing out of particles of metal, called "sparking," which had not been anticipated when the railway was constructed, but that nothing was done to remedy it, and that it would have been feasible to construct a trough or pan which would have prevented the falling of sparks upon persons in the street, that the railroad commissioners had the matter of sparking under investigation and had made no recommendation and taken no action except to cause the investigation to be made. *Held*, that whether as matter of law the defendant should have applied to the railroad commissioners for the approval of a pan it was unnecessary to decide, but that, the jury having found that a pan was reasonably necessary, it was the duty of the defendant either to apply to the commissioners for their approval or to put up a pan without such approval, and that the finding of the jury was warranted.

MORTON, J. Something which the jury found to be a piece of metal from the operation of the contact shoe on the defendant's elevated railway got into the plaintiff's eye while he was crossing Atlantic Avenue between one and two P. M. on January 23, 1902, and this is an action of tort to recover damages for the injury caused thereby. There was a verdict for the plaintiff, and the case is here on exceptions by the defendant to the refusal of the judge to rule that on all the evidence the plaintiff was not entitled to recover. The judge submitted two questions to the jury to be answered by them if they found for the plaintiff: "(1) Did the piece of metal in the plaintiff's eye come from the operation of the brake shoe or the contact shoe, or neither?" to which the jury answered, "The operation of the contact shoe," and "(2) Was the negligence of the defendant in the failure to use a different contact shoe, or in failure to apply to the railroad commissioners, for approval of a pan, or both?" to which the jury answered, "In failure to apply to the railroad commissioners for approval of pan." Other questions not now material were submitted to them to be answered in case they found for the defendant.

The defendant does not now contend that the plaintiff was not in the exercise of due care and we therefore treat that question

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as no longer in issue. It is plain that in crossing Atlantic Avenue, as the evidence tends to show that he did, no lack of ordinary care could be imputed to the plaintiff. He was not bound to wait until there was no train passing overhead, or until the train that was passing had gone along. The surface of the street was and is supposed to be safe for travel notwithstanding the structure and trains overhead.

The defendant's contentions are two: first, that there is nothing to show that what injured the plaintiff's eye came from the contact shoe, and secondly, that there was nothing to warrant the jury in finding that the defendant was negligent in failing to apply to the railroad commissioners for approval of the pan; the still further contention being included in this last, that the effect of the answer of the jury to the second question is to exclude from consideration any evidence of negligence in the selection of the contact shoe that was used.

1. We think that there was evidence warranting the finding by the jury that the particle which entered the plaintiff's eye came from the operation of a contact shoe. In the question to the jury it was assumed, and without objection so far as appears, that the particle was a piece of metal. This assumption was justified by the evidence. The particle was described as about a sixteenth of an inch in length and long, narrow, wedge-shaped and pointed, "with the broad end somewhat wider than the edge of a pin." The oculist whom the plaintiff consulted testified that the pupil showed a small scar and circular brown stain which in his opinion were caused by a piece of steel or iron which he thought was rusty. On cross-examination he said that he had never seen a hot cinder leave such a stain. This evidence justified the conclusion that the particle was a piece of metal and not a cinder. The plaintiff's testimony and other testimony in the case tended to show that it came from the elevated railway, and the fact that it was a piece of metal increased the probability that it did. The plaintiff testified that he was going under the westerly side of the structure and heard the noise of a train passing overhead, and then the particle got in his eye. He said that he thought that he had crossed the first track and was about to cross the second. Whether he meant the surface tracks or whether he meant that he had crossed under the first elevated

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track and was about to cross under the second is not plain and is not material. In either view it is clear that the particle got into his eye just as he was going under the elevated structure and as a train was passing overhead. And there was testimony tending to show that sparks had been frequently seen to fall in the general vicinity of the place of the accident when trains were in ordinary motion and that they sometimes fell in showers and reached the pavement. These circumstances rendered the inference that the particle came from the elevated railway a fair and reasonable one and warranted a finding to that effect. The time and place of the accident, the character of the particle, the fact that a train was passing overhead, and that sparks fell from trains in ordinary motion would lead naturally to the conclusion that the particle came from the railway. Whether it came from the brake shoe or the contact shoe or some other portion of the structure is more difficult to determine. The oculist called by the plaintiff testified that he thought that the scar and stain which he found in the plaintiff's eye were caused by a piece of rusty iron or steel, and that, while the stain might have been caused by a piece of metal hot enough to produce charred tissue, he found no charred tissue; which would tend to show that the particle came from some other portion of the structure. But the plaintiff testified that the oculist who examined his eye on behalf of the defendant, and who was not called by the defendant, told him that there was a burn on the eye, which would tend to show that the particle came from the brake shoe or the contact shoe, from both of which heated particles were thrown off, though those from the contact shoe were hotter than those from the brake shoe and would therefore be more liable to cause a burn and scar than those from the brake shoe. The direction in which the train was going was also important. There was evidence that it was going north, and if so, owing to the positions of the stations, there would have been no occasion to apply the brakes. The plaintiff could not tell which way it was going. But a companion who was with him testified that it was going north; and though not willing to swear absolutely to it, said that there was no doubt in his mind that it was going north. If the jury believed that the train was going north, then it would seem almost to follow that the particle could not have come from the

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brake shoe. Moreover there was testimony tending to show that although there had been a good deal of trouble from the sparking of the contact shoes, there had been no difficulty and no accidents to people underneath by reason of brake shoe sparks. Taking all of the circumstances into account it was competent for the jury to find, and the evidence fairly warranted them in finding, that the particle came from the contact shoe. The strength and direction of the wind, the exact position of the plaintiff, and the inferences and conclusions to be drawn from these and the other facts in evidence were all for the jury. The plaintiff was not bound to exclude the possibility that the accident might have happened in some other way, but only to satisfy the jury by a fair preponderance of the evidence that it occurred in the manner in which he contended that it did. In *McGee* v. *Boston Elevated Railway*, 187 Mass. 569, and *Wadsworth* v. *Boston Elevated Railway*, 182 Mass. 572, relied on by the defendant, there was nothing to remove the cause of the accident from the domain of conjecture. In this case, though no one saw where the particle came from, the combination of circumstances was such as to warrant a finding, as already observed, that it came from the contact shoe.

2. The defendant further contends, and this is its principal defence, that the evidence did not warrant a finding that there was any negligence on its part in failing to apply to the railroad commissioners. If this defence fails, then it still further contends that there is nothing to show that the sparking could have been prevented by the exercise of ordinary care and diligence, and that the accident was not therefore due to any negligence on its part.

We assume in favor of the defendant that the effect of the answer to the second question is to show that the verdict was rendered on the ground that the defendant was negligent in failing to apply to the railroad commissioners, and that, if such an application was not required, and there is nothing in any view of the case to warrant as matter of law such a finding, then the verdict must be set aside. The answer necessarily shows, we think, that the jury must have found that a pan was needed for the proper protection of pedestrians and others having occasion to use the roadway underneath the elevated structure; otherwise

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there would have been no occasion for the defendant to apply to the commissioners. Whether the sparking could have been prevented by the use of a different shoe, or by a different mode of adjustment, or both, the jury does not appear to have decided, having been apparently content with the conclusion that injury to pedestrians and others having occasion to use the roadway could be avoided by the use of a pan.

The railroad commissioners approved the plans for the railway as constructed and gave the certificate required before it could be operated and allowed it to continue as before after investigating the subject of sparking. The defendant contends that the action of the commissioners is not reviewable by the court or jury; that the effect of it is to authorize the operation of the railway without a pan; and that, therefore, there could be no such thing as negligence on its part in failing to apply to them for approval of a pan. The statutory provisions on which it relies in support of this contention are to be found in St. 1894, c. 548, § 18, and St. 1897, c. 500, §§ 2, 6. The first is entitled "An Act to incorporate the Boston Elevated Railway Company and to promote rapid transit in the city of Boston and vicinity," and the second is entitled "An Act to promote rapid transit in the city of Boston and vicinity" and is in amendment of and in addition to the first. The two acts, therefore, must be construed together. Section 18 of St. 1894, c. 548, provides in substance, so far as now material, that when the railway in any portion has been completed, before it shall be opened to public use it shall be examined by the railroad commissioners on the application of the corporation, and "if it appears to be in a safe condition for operation" the "board shall give a certificate to said corporation to that effect, which certificate shall be filed in the office of the secretary of the Commonwealth, and thereupon said corporation shall be authorized to operate said railway." Section 2 of St. 1897, c. 500, provides, so far as material, that the "corporation may construct lines of elevated railway according to such plans or systems as the board of railroad commissioners may approve, to be operated," etc. This is in amendment of the first paragraph of § 6 of St. 1894, c. 548. Section 6 of St. 1897, c. 500, provides, so far as material, that the corporation shall prepare and file with the railroad commissioners "plans showing the form

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and method of construction proposed, and the proposed location of the tracks, elevated structure and stations," and the "board shall examine the same with reference to the strength and safety of the structure, and to the strength and safety of any bridge traversed thereby, and with reference to the rolling stock, motive power and method of operation, and with reference to the convenience and comfort of the public. . . . When said construction plans are satisfactory to said board they shall give a certificate approving the same." The corporation is not to proceed with the construction of the road till the certificate has been given, and if the plans are not satisfactory the board may require them to be changed before giving its certificate, and any structure erected in accordance with the plans may be changed or modified by the corporation with the consent of the board.

The effect of these various provisions is to require the commissioners to approve the plans before the railway can be constructed, and to require, after the completion of the whole or a part of it, a certificate from them that it appears to be in a safe condition for operation before the corporation can operate it. In examining the plans the commissioners are required to consider the strength and safety of the proposed structure, the rolling stock, motive power and method of proposed operation, and the comfort and convenience of the public; and their judgment, in respect to these matters, so far as they enter into their approval of the plans, cannot be impeached or controlled. It cannot be shown, for instance, that the railway is unlawfully maintained, because the approval by the commissioners of the plans was due to a mistake on their part, if such was the fact, as to the strength and safety of the proposed structure or the comfort and convenience of the public. Their approval is conclusive on the right and authority of the corporation to construct its railway as proposed and has the same effect as an authority conferred by the Legislature to construct it in the manner proposed would have. Taken in connection with their certificate, under § 18 of St. 1894, c. 548, that the railway appeared to have been constructed in accordance with the plans, and appeared to be in a safe condition for operation, it established the structure as a lawful structure and as lawfully maintained and operated by the defendant. But neither the approval of the plans by the

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commissioners nor their certificate of operation relieves the corporation from liability in case any one who would otherwise have a cause of action is injured by negligence on its part in the construction or operation of the railway. The test is not the approval or certificate of the commissioners any more than the satisfaction of the superintendent of streets was in *Osgood* v. *Lynn & Boston Railroad*, 130 Mass. 492. In the absence of anything to exonerate it, the corporation is still bound to exercise reasonable care and diligence in all matters relating to the construction and operation of its railway. It is expressly provided by § 21 of St. 1897, c. 500, that the corporation shall be subject to all the duties, liabilities and restrictions set forth in general laws relating to street railway companies so far as applicable, and the general laws relating to street railway companies make them liable for any loss or injury which may be sustained by any person in the management, use and construction of its tracks. R. L. c. 112, § 44. The object of the Legislature in requiring the approval of the plans by and the certificate of operation from the railroad commissioners was to ensure as far as might be by means of the preliminary investigations and examinations thus required the safety, comfort and convenience of the public. It was not intended, we think, as already observed, to relieve the defendant from the exercise of reasonable care and diligence in the construction and operation of the railway. If the approval of the plans by the commissioners and their certificate of operation are not conclusive on the question of the exercise of reasonable care and diligence by the defendant, manifestly the fact that the commissioners had had the matter of sparking under investigation and had made no recommendation and taken no action except to cause an investigation to be made cannot be held to be conclusive. See also *Hubbard* v. *Boston & Albany Railroad*, 162 Mass. 132.

Moreover it is to be noted, that trouble from sparking was not anticipated when the railway was constructed, and, therefore, the safety of the structure with reference to sparking could not have been included in the approval of the plans by the commissioners. It is also to be noted, that the certificate required before the corporation can operate the railway is a certificate that it appears to be in a safe condition for operation, not that it

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is safe, thus leaving open the question of actual safety with all the consequences involved.

The plaintiff contends that the approval and the certificate of the commissioners came under R. L. c. 111, § 20, which provides that no request or advice of the commissioners shall impair the legal obligations of railroad corporations or relieve them from the consequences of negligence on the part of their servants or agents. But the approval and certificate, it seems to us, are to be regarded as something more than advice by the commissioners. They are in the nature of conditions precedent without which the defendant could not proceed to construct or operate its railway, and for want of which it could be restrained on the petition of any party interested from proceeding with the construction or operation of its railway. St. 1894, c. 548, § 20.

Whether the defendant should, as matter of law, apply to the commissioners for their approval of a pan it is not necessary for us now to decide. If a pan was reasonably necessary, as the jury, according to our view, have found was the case, then it was either the duty of the defendant to apply to the commissioners for their approval, or to proceed to put up one without such approval. *Chase* v. *Lowell*, 151 Mass. 422. It has done neither, and is consequently at fault if the evidence warranted the finding that a pan was required. Without going into the evidence in detail, it seems to us that it warranted such a finding. Assuming without deciding that the defendant had done as it contends that it had, all that, in view of the state of knowledge on the subject when the railway was constructed, it could be reasonably required to do to prevent sparking, its whole duty to safeguard the public from the dangers and injuries resulting from sparking was not thereby discharged. If there was any appliance which, in the reasonable operation of its railway, could be used to intercept the sparks or prevent them from falling to the ground and injuring pedestrians and others having occasion to use the street below, it was its duty to avail itself thereof. It was not enough for it to do all that could be reasonably required to prevent sparking (though we do not mean to intimate that it had done that) and stop there; it was also bound to do all that it reasonably could, if it was impossible to prevent sparking, to see that no one was injured by the sparks. Their duty

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to exercise reasonable care to prevent injury to others extends to all particulars connected with the construction and operation of the railway, and is not entirely discharged even if satisfactorily performed as to some of those particulars. There was evidence that it would have been feasible to construct a trough or pan which would have prevented the falling of sparks upon persons in the street, and that it was known that there was a good deal of trouble from sparking after the road began operation in June, 1901, but nothing was done to remedy it. This warranted a finding of negligence on the part of the defendant. The weight and credibility of the evidence and the inferences and conclusions to be drawn from the testimony as a whole were of course for the jury. We see nothing to justify us in setting aside the verdict and granting a new trial.

Some questions of evidence are raised by the bill of exceptions, but they have not been argued and we therefore treat them as waived.

Exceptions overruled.

E. P. Saltonstall & S. H. E. Freund, for the defendant.

O. O. Partridge & H. M. Channing, for the plaintiff.

KATHERINE J. SALLINGER *vs.* NATHAN B. SMITH & others.

Middlesex. March 7, 1906. — June 20, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Board of Health. Smallpox Hospital. Landlord and Tenant. Evidence.

The board of health of a city which had no hospital for contagious diseases, finding a case of smallpox in the family of one of the tenants of a certain house belonging to a woman, quarantined the building and occupied it for a smallpox hospital, treating forty or more cases there. The board of health caused no warrant to issue under Pub. Sts. c. 80, § 43, which then was in force, to take the building as a hospital, but the owner of the house executed a lease to them for a certain period for a monthly rent named therein which it was stipulated should continue for such further time as the lessees should hold the premises. After the expiration of the term of the lease the monthly rent was increased in amount, the occupation as a hospital continued and the owner of the house continued to receive the rent. Later she brought an action of tort against the members of

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the board of health for damages for alleged unlawful occupation of her premises. In this action she offered to show that in executing the lease she did not believe or realize that she was signing away any rights to recover damages and that since the occupation by the defendants her house had been commonly known as "the pest house." The evidence was excluded, and a verdict was ordered for the defendants. *Held*, that the lease and the continued receipt of rent by the plaintiff after its expiration operated as a consent to the occupancy of the house by the defendants for a smallpox hospital and rendered any action by them under the statute unnecessary; that the evidence offered by the plaintiff properly was excluded as incompetent and immaterial; and that the verdict for the defendants was ordered rightly.

MORTON, J. This is an action of tort to recover damages for the alleged unlawful occupation and use of the plaintiff's premises as a smallpox hospital by the defendants as the board of health of the city of Everett. At the close of the evidence the judge ordered a verdict for the defendants, and the case is here on exceptions by the plaintiff to this ruling and to the refusal of the judge to give certain rulings that were requested by her.

We think that the ruling was right. On the twenty-second of November, 1901, the defendants found a case of smallpox in the family of one of the plaintiff's tenants, and thereupon quarantined the plaintiff's premises, and occupied them for a smallpox hospital, — some forty or forty-two cases in all being attended to there. The city of Everett had no hospital for contagious diseases at that time, and the premises were in the control of the defendants till some time in the following September. The defendants had no right to use the plaintiff's premises for a smallpox hospital without her consent, except under a warrant issued in accordance with the provisions of Pub. Sts. c. 80, § 43, which were in force at the time. *Hersey* v. *Chapin*, 162 Mass. 176. But on the twenty-fourth of December, 1901, the plaintiff executed a lease of the premises to the defendants for the term of three months from November 22 at $36 a month with an option on the part of the lessees to hold for four months from said November 22. The lease provided that the lessees were to pay the rent stipulated during the term and for such further time as the lessees should hold the premises. The rent was subsequently increased to $48 a month from April 22, 1902. It is plain, we think, that the lease and the continued receipt of rent after the expiration of the term named operated as a consent by the plaintiff to the occupancy of the premises by the defendants for a

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smallpox hospital and rendered any action by them under the statute unnecessary.

The evidence offered by the plaintiff to show that in executing the lease she did not believe or realize that she was signing away rights to recover damages, and that since November, 1901, the house had been commonly known in Everett as "the pest house" was rightly excluded.

No fraud or misrepresentation was practised upon her and her unexpressed belief and her failure to realize the full scope and effect of what she was doing was incompetent and immaterial. So also was the fact that the house was known as "the pest house."

The view which we have taken of the effect of the lease and the continued payment and receipt of rent renders it unnecessary to consider the rulings requested.

Exceptions overruled.

H. S. Dewey, for the plaintiff.

W. S. Thompson, for the defendants, submitted a brief.

DAVID REGAN *vs.* SAMUEL LOMBARD & another.

Suffolk. March 12, 1906. — June 20, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Negligence, Employer's liability.

It is not the duty of the superintendent in charge of a yard where curbstones, some of them curved, are piled, to warn a workman, who from his previous experience is familiar with the way in which the curbstones are piled and with the general character of the dunnage placed between them to keep them steady and knows that if the curbstones are piled improperly or if the dunnage is rotten the pile or a part of it may be rendered unstable and some of the stones fall off, and who when preparing to remove a curbstone from such a pile by means of a derrick has an unobstructed view of the pile, that he may be injured by some of the stones sliding or falling upon him owing to improper piling or the giving way of decayed dunnage.

TORT, by a workman employed in the stone yard of the defendants at a wharf in that part of Boston called Charlestown, for personal injuries received on June 18, 1899, with three

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counts, the first of which was waived by the plaintiff, the second count being under St. 1887, c. 270, § 1, cl. 2, alleging negligence of a superintendent, and the third count being at common law. Writ dated July 14, 1899.

At the first trial in the Superior Court *Richardson*, J. refused to order a verdict for the defendants and submitted the case to the jury upon the second and third counts. The jury returned a verdict for the plaintiff on the count at common law in the sum of $5,000; and the defendants alleged exceptions, which were sustained by this court in a decision reported in 181 Mass. 329.

At the second trial before *Stevens*, J. the plaintiff relied only on the second count under the employers' liability act alleging negligence of a person entrusted with and exercising superintendence. The following facts were not in dispute, nor were they in dispute at the first trial:

The defendants were copartners, and for many years had carried on a general teaming business in Boston, requiring about one hundred horses, and also had carried on a granite business, with several stone yards, one of which was at a wharf in Charlestown where the accident occurred. They dealt principally in large curbstones. Some were straight, and some of the stones, called circle stones, were curved, forming segments of circles of different radii. The stones varied from five to ten feet in length, from eighteen to twenty inches in width, and from seven to twelve inches thick, being about seven inches thick on the top and from seven to twelve inches on the bottom. These stones came by water, and were unloaded from scows upon the wharf.

Some forty or fifty feet back from the cap of the wharf stood a permanent derrick with a long boom which could be raised and lowered in the usual way, and which also swung around describing a circle. After the stones were unloaded, they were taken by means of this derrick from the wharf and placed in piles or tiers around the circle described by the boom, one end of each pile pointing toward the derrick. These tiers of stones formed two circles, an inner and an outer circle. The stones were deposited in or taken from the outer circle by lowering the boom, and from the inner circle by raising it. The circle stones were placed with their convex sides down, those

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having the same radii being placed in the same tier or tiers, and piled from five to seven stones high. Two sticks or pieces of wood called "dunnage" were placed between every two stones as they were piled at right angles with their length, from one quarter to one third distant from each end, separating the stones three inches, more or less; and often long binder sticks were used running through two or more piles to steady them. Ordinarily two pieces of wood were used, but sometimes it was necessary to chink up and put in several small pieces in order to keep the piles level.

As stones were sold, they were taken in the same way by the derrick from the tier where the stones of the same radius and dimensions were piled and loaded upon teams, so that the heights of the tiers would vary from time to time. At the time of the accident a tier in the outer circle contained five or six circle stones. The next tier on the water side contained one stone, and the next tier beyond contained two or three.

At the time of the accident, the plaintiff and one Hanlon, employed by the defendants, were about to remove the top stones from the tier of five or six to get out the third stone from the top. The plaintiff had just walked in on the water side of the tier to assist when the three top stones fell or slid off toward him, throwing him down and causing the injuries complained of.

The plaintiff had been in the employ of the defendants as a teamster for fifteen or sixteen years. Several months before, the plaintiff had been thrown from his team and received injuries which had prevented him from working until about two or three weeks before the accident now in question. When he returned to the defendants' employ he was set at work to look after paving stones in their yard at Cambridge and after that he worked in their yard at the Boston and Maine Railroad before coming to the yard in Charlestown where the accident occurred.

Other evidence in the case is described in the opinion.

At the close of the evidence the judge ruled that the plaintiff was not entitled to have the case submitted to the jury, and ordered a verdict for the defendants. The plaintiff alleged exceptions.

O. O. Partridge, for the plaintiff.

C. S. Knowles, for the defendants.

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BRALEY, J. In *Regan* v. *Lombard*, 181 Mass. 329, it was decided that this action could not be maintained at common law, but whether the plaintiff could recover on the count under St. 1887, c. 270, § 1, cl. 2, was not determined. At the second trial the plaintiff relied solely on this count, which alleged that he was injured by reason of the negligence of some person entrusted by the defendants with the duty of superintendence, and who at the time of the accident was engaged in the performance of this duty. Assuming, without deciding, that there was evidence from which the jury could have found that Hanlon was a superintendent within the meaning of the statute; that the curbstones were improperly and insecurely piled, or the dunnage between them either originally was unstable, or had become rotten and unsound, and that in the exercise of reasonable diligence the superintendent should have known of these conditions which might render it unsafe and dangerous for the plaintiff to assist in removing them, yet he cannot recover if at the time of the accident he was guilty of contributory negligence. *Fitzgerald* v. *Connecticut River Paper Co.* 155 Mass. 155. *O'Maley* v. *South Boston Gas Light Co.* 158 Mass. 135. *Wagner* v. *Boston Elevated Railway*, 188 Mass. 437. The stones, when placed, consisted of two circular tiers open at one end, and so arranged that between the inner and outer circles there was a space, into which the plaintiff and other employees went when the stones were to be removed by means of a derrick, the boom of which when lowered for either tier described in its movement the circumference of each circle. As the stones of each tier were piled, when necessary they were adjusted by wooden blocks of different lengths, which kept them separate and rendered the completed pile level and stable. When needed they were raised from their position by the derrick, and lowered upon a dray, and by these removals the height of the tiers varied.

It was the undisputed evidence of the plaintiff that he had been in the employment of the defendants for many years, during which he had assisted in other yards belonging to the defendants in piling and placing similar stones by the method described, and that, although while working in this yard for a considerable time before the accident he did not assist on the tier which fell, yet the tiers in the different yards were sup-

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ported substantially in the same way and he was familiar with the process used. In describing this process he further said that it was the duty of those who piled to chink the stones by the use of dunnage, which consisted of such refuse wood as could be picked up on the premises. After being placed the arrangement of the stones which fell involved no complexity of design such as may arise in the adjustment of ways, works and machinery to adapt them to the purposes of a manufacturing establishment where the mechanism employed or the hazard arising from its use is such as not to be fully understood by the inexperienced employee, or where for the first time a servant is directed by his employer, or by those who properly represent him, to use an instrumentality which is defective, and the defect is or should have been known to them, but is unknown to him. In such cases the servant properly may rely upon the presumption that he will not be directed to put himself in a situation where he may be exposed to the chance of physical injury, or called upon to perform his work by using unsafe appliances. *Connolly* v. *Waltham*, 156 Mass. 368. *Cunningham* v. *Atlas Tack Co.* 187 Mass. 51. *Feeney* v. *York Manuf. Co.* 189 Mass. 336. If it could have been found that the accident was caused by the improper piling, or the decayed dunnage which gave way, thus permitting the stones to lose their balance, and to slide or fall upon him, and that the defendants or their representatives should have known and notified the plaintiff of this possible danger, even then he would not have been put in possession of any facts of which he was ignorant, or with which by the use of ordinary care he could not have made himself acquainted. From his former experience he had become familiar with the general character of the dunnage used as well as the proper manner of setting the stones in place, and as a person of ordinary intelligence must have been aware that, if the dunnage was rotten or the stones improperly put in position, the structure, or a part of it, when disturbed, might be rendered unstable and some of the stones fall. Moreover, he testified that when he entered between the tiers his opportunity for observation was unobstructed, and equal to that of anybody, for their general character was plainly visible. Any warning from the superintendent, that if the dunnage was rotten or the stones had become

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unplaced they might fall, would have conveyed to him no information of which he did not have already, and the failure to apprise him of an obvious danger, which under the circumstances he either knew or must be held to have known to be present, does not constitute a breach of duty by the superintendent while so acting, and therefore a verdict for the defendants was rightly ordered. *Downey* v. *Sawyer*, 157 Mass. 418. *Goodes* v. *Boston & Albany Railroad*, 162 Mass. 287. *Lamson* v. *American Axe & Tool Co.* 177 Mass. 144. *Meehan* v. *Holyoke Street Railway*, 186 Mass. 511.

Exceptions overruled.

CHARLOTTE W. HAWES *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. March 14, 1906. — June 20, 1906.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Negligence. Elevated Railway.

In an action for personal injuries against a corporation operating an elevated railway, it appeared that the plaintiff was a small and frail woman who was unfamiliar with elevated cars and platforms and never had crossed from the platform of one car to that of another, that she had a young child in her arms, got upon the platform of a car of one of the defendant's trains and was entering the door when a brakeman speaking sharply said "Smoking car, madam; you can't go in there; cross over into the front car, and move quickly," that in attempting to obey him she fell between the cars receiving the injuries sued for, that in attempting to pass between the cars she did not look down, her mind being on the child, and the brakeman gave her no warning or assistance, that the platforms of the cars curved away from each other, the space between them being seven inches at its narrowest part and eleven inches at its widest part, that the curves of the platforms of the cars were determined by the shortest curve of the track which it was necessary for cars coupled together to pass and were no greater than was required for that purpose, that experiments had been made with a buffer coupling, which was the best device known for covering the space between the ends of the cars, and that the device had been shown to be impracticable. *Held*, that, even if there was evidence that the plaintiff was in the exercise of due care, which was doubted, there was no evidence of negligence on the part of the defendant.

MORTON, J. This is an action of tort to recover for personal injuries received by the plaintiff by falling through an open space

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between the platforms of two of the defendant's cars while passing from one to the other with an infant in her arms. She had got on to the platform of a car of one of the trains of the elevated railway, and was in the act of entering the door when the brakeman spoke up sharply and said "Smoking car, madam; you can't go in there; cross over into the front car, and move quickly." In attempting to obey him she fell between the cars receiving the injuries complained of. The train was at a standstill and she was not pushed or jostled by any other persons. The judge ordered a verdict for the defendant and the case is here on the plaintiff's exceptions to this ruling.

We think that the ruling was right. The plaintiff testified amongst other things that the child as she held it prevented her from seeing the space between the platforms and that it required her attention; that her mind was on the child and she was protecting it; that she was herself small and frail and was unfamiliar with the elevated cars and platforms and had never crossed from one platform to another and did not know that there was any space between them; that she did not look down; and that the brakeman gave her no warning or assistance. The space between the two platforms at its narrowest part was seven inches wide and eleven inches wide in its widest part, and the ends of the platforms were so constructed that they curved away from each other. The passageway was about two feet wide in the middle of the platforms which were six feet in width, and on each side of the passageway on each platform about an inch and a half from the edge was an iron post or rod supporting the vestibule roof which covered the platform. The plaintiff testified that in crossing it was necessary to avoid these posts. The defendant introduced evidence which was uncontradicted that the curves of the platforms of the cars were determined by the shortest curve which it was necessary for cars coupled together to pass and were no greater than was required, and that experiments had been made with the Gould buffer coupling which was the best device known for covering the space between the ends of cars, and "the couplers went to pieces."

We see no evidence of negligence on the part of the defendant. There is nothing to show that the space between the cars could have been made any less or that the ends of the plat-

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forms could have been made any different. The defendant was not bound to warn the plaintiff of the space between the cars, or to assist her in crossing from one to the other, and the brakeman's request to move quickly was not, in view of the nature of the defendant's business, an unreasonable one. Whether the plaintiff was in the exercise of due care need not be decided. But it would seem that for her to step from one car to the other without looking down was hardly consistent with the exercise of due care on her part. The infant in her arms and her own inexperience and weakness would seem to have called for the exercise of more care, instead of serving as an excuse for the exercise of less care. The case is fully covered by previous cases. *Welch* v. *Boston Elevated Railway*, 187 Mass. 118. *Falkins* v. *Boston Elevated Railway*, 188 Mass. 153. *Willworth* v. *Boston Elevated Railway*, 188 Mass. 220. *Field* v. *Boston Elevated Railway*, 188 Mass. 222. *Hilborn* v. *Boston & Northern Street Railway*, 191 Mass. 14.

Exceptions overruled.

J. W. Pickering, for the plaintiff, submitted a brief.

S. H. E. Freund, (*E. P. Saltonstall* with him,) for the defendant.

GLADYS J. KIDDER *vs.* SUPREME COMMANDERY UNITED ORDER OF THE GOLDEN CROSS.

Suffolk. March 15, 1906. — June 20, 1906.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Fraternal Beneficiary Corporation. Insurance, Life. *Pleading, Civil. Estoppel.*

A misrepresentation, which is not a warranty, in an application to a fraternal beneficiary corporation for membership and insurance, unless made with actual intent to deceive or unless the matter misrepresented increased the risk of loss, does not avoid a certificate issued on the application.

Although by R. L. c. 119, § 22, the provision of R. L. c. 118, § 21, that no misrepresentation or warranty by the assured shall defeat a policy of insurance unless "made with actual intent to deceive or unless the matter misrepresented or made a warranty increased the risk of loss," does not apply to fraternal beneficiary corporations, that provision, so far as it relates to misrepresentations which are not warranties, is merely declaratory of the common law.

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In an action against a fraternal beneficiary corporation by the beneficiary named in one of its certificates, the defendant contended that the certificate was void because the insured member upon whose death the benefit was payable had made misrepresentations in her application for insurance and membership. It appeared that the insured in her application had stated that she had not been treated by a physician within the past twelve months; that she never had had any protracted illness; that she was in perfect health so far as she knew or believed; that she had not been obliged to consult a physician or lose any time from her usual occupation on account of sickness at any time during the past five years; that no physician ever had given an unfavorable opinion upon her life or health; and that no material facts bearing upon her life or health had been omitted or suppressed. It further appeared that during the year preceding her application the insured had consulted a physician and had received medical advice and treatment for slight ailments which caused her to be confined to her bed for about eight or ten days, that, although she formerly had believed or suspected that a serious physical trouble existed, her family physician after an examination assured her to the contrary and she accepted and acted upon his opinion which was a correct one, that her occupation was that of a housewife and the evidence warranted a finding that it had not been interrupted by any long continued or severe sickness which rendered her incapable of supervision of the household. *Held*, that the incorrect answers of the insured were representations only and not warranties, that it was for the jury to find under suitable instructions whether the incorrect answers were material or intentionally false, and that unless they were intentionally false or increased the risk they were no bar to the plaintiff's recovery.

The by-laws of a fraternal beneficiary corporation provided that any member who gained admission by reason of any false statements contained in his application for membership should on conviction be expelled, but that before such expulsion could be ordered the accused was entitled to be informed of the charges made against him and to be heard in defence. An insurance certificate had been issued to a woman upon her application, and the corporation had recognized her as a member by receiving dues and assessments from her. Thereafter, without any previous notice giving her an opportunity to be heard, in obedience to an order of the principal officer of the corporation authorized to act in its behalf, the subordinate commandery voted to return to this woman the amount previously paid by her for dues and assessments and to notify her that having gained admission through misrepresentation she was disconnected, but no tender ever was made nor notice communicated to her, because she was mortally sick and substantially unconscious at the time the vote was passed and until her death. In an action by the beneficiary named in her certificate to recover the amount of the insurance, the defendant asked for a ruling that if the defendant rescinded the contract and expelled or disconnected the insured from the order, it became her duty if she desired to continue her membership to exhaust by an appeal the remedies provided by the constitution and by-laws for reinstatement. The ruling was refused. *Held*, that the ruling was refused rightly; that if the expulsion, although declared without granting the member an opportunity to be heard, could be upheld as valid until suspended by an appeal, no effective notice of expulsion or disconnection having been given to the insured the attempted act of rescission never was perfected and there was no occasion for resorting to an appeal.

In an action against a fraternal beneficiary corporation by the beneficiary named

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In one of its certificates, if the defendant relies on the defence that the insured had forfeited his membership by a failure to pay the regular monthly assessments, this defence must be pleaded specially and is not open to the defendant under an answer which as to this issue contains only a general denial.

In an action against a fraternal beneficiary corporation by the beneficiary named in one of its certificates, *whether* the defendant can set up the defence that the insured had forfeited his membership by a failure to pay or tender the regular monthly assessments, if the failure to pay or tender the assessments was after the defendant had declared that the membership of the assured was terminated and had ordered its subordinate commandery not to receive dues or assessments from the insured or from any person acting in his behalf, *quaere*.

CONTRACT by the beneficiary named in a benefit certificate issued by the defendant, a fraternal beneficiary corporation, upon the life of the plaintiff's mother, one Bertha L. Kidder. Writ dated April 11, 1904.

At the trial in the Superior Court before *Stevens*, J. the plaintiff introduced in evidence the benefit certificate, the application for insurance signed by the insured, the medical examiner's report and the constitution and by-laws of the defendant, proved the death of the insured, and rested.

The defence relied upon was that the certificate was void by reason of misrepresentations made by the insured in her application and in her answers to the questions of its medical examiner, and also that the defendant, having discovered the alleged misrepresentations after the insured had been admitted to the order, had disconnected her from the order; that it had a right so to disconnect her and that, as she did not appeal to the highest authority in the order, such expulsion was legal and she was not a member of the order at the time of her death, and consequently the benefit certificate issued to her was void. The defendant further contended at the trial that the insured, having failed to pay or tender the assessment for April, 1903, had under the by-laws of the defendant ceased to be a member on May 1, 1903, and that she was not a member when she died.

The insured made her written application for insurance and membership on November 8, 1902; she became a member of the order on December 8, 1902, and died on May 26, 1903.

The insured stated in her written application for insurance that "she had not been treated by a physician within the past twelve months"; that she never had had any protracted illness,

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or severe injury; that she was in perfect health so far as she knew or believed; that she had not been obliged to consult a doctor or lose any time from her usual occupation on account of sickness at any time during the past five years; that no physician ever had given an unfavorable opinion upon her life or health, and that no material facts bearing upon her life or health had been omitted or suppressed.

Dr. F. W. Plummer, a witness called for the defendant, testified that in April of 1901 Mrs. Kidder called at his office about her general condition. She then said she had been told that she had a fibroid tumor on the womb. He made an examination and found no evidence of such tumor, but found a slight discharge from a very mild case of leucorrhea. She appeared tired and overworked and the witness ordered a tonic and a simple wash for the discharge. She made five calls upon the witness at that time in April, May and June. In September, 1901, the witness again treated Mrs. Kidder, this time at her house. Mr. Kidder had been sick and the witness had treated him personally in the latter part of August of that year, and after his recovery he treated Mrs. Kidder who was worn out, he supposed, from nursing her husband. The witness testified with reference to this period that when he first went there he found Mrs. Kidder in bed, or, if not, he put her there, and that she was in bed eight or ten days possibly.

On cross-examination the witness among other things testified as follows:

"*Q.* Did you learn that any physician had given an unfavorable opinion of her health or her life? *A.* I suppose that that statement when she came to me the first time saying she had a fibroid tumor, — I presume that would be an unfavorable statement. I don't say, — he said, — she said the physician made such a statement to her. — *Q.* After your examination of her what was her state of mind on that? *A.* I think she accepted the statement that my examination was right. I suppose she may have had a wonder sometimes if I examined her fully. I refer to that because on the day of the operation she said, — 'You'll find out about the fibroid now for sure when you open me.' That is all the conversation that I know of."

The operation referred to was on January 9, 1903, in the early

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part of an attack of peritonitis from which Mrs. Kidder died on May 26 of the same year.

Dr. Plummer further testified that he considered Mrs. Kidder an insurable risk when she first consulted him in the spring of 1901 and also after she recovered in September, 1901. He also testified that the illness in 1902 in his opinion began very soon before he was called on December 26; that it was no long suffering disease, but a new and acute disease, sharp and sudden.

He further testified that at the time of the operation on Mrs. Kidder in 1903 there were no symptoms of any tumor ever having existed, or of any previous operation, and that none of the organs had been removed, but were all present. There were then no signs of any severe injury and no signs of any tumor or cancer.

Dr. C. W. McClearn, medical examiner for the defendant at Malden, who examined the insured for admission to the defendant, and who signed the medical examination, testified that he examined the insured when she applied for membership in the order, that at that time she showed no indication of disease and that he did not consider her in a run down condition, that he asked her the usual questions, and wrote the answers as she gave them and that he examined the questions and answers; that the application was filled out and had been signed by the insured at the time of his examination; that his acceptance of the insured was based upon his examination, her answers to his questions and her answers in the application. The witness further testified that, if he had known of the illness of the insured in the year 1901 as testified to by Dr. Plummer, he should not have accepted her as a risk but would have advised her to wait; that he would not have approved her application if she had told him what she had told Dr. Plummer; that the history of her condition as given by her was clear and showed no trouble, and that if she had told him that a doctor had told her that she had a fibroid tumor he should have told her to wait.

Dr. Godfrey Ryder, another witness for the defendant, testified that he first knew of Mrs. Kidder at the time of the operation on her on January 9, 1903, performed by Dr. Plummer and himself, and that in his opinion the disease from which she was suffering had been in existence a comparatively short time.

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The material evidence as to the defendant's alleged disconnecting of Mrs. Kidder from the order, and as to the payment of the assessment of April 1, 1903, is stated in the opinion.

The defendant asked the judge to make the following rulings:

"The insured, having been asked in her application the question, — 'Have you been treated by a physician within twelve months,' and having answered in the negative, if the jury find that she has been so treated within the time, such misstatement by her in her application increases the risk of loss in a life insurance contract.

"The insured was 'treated by a physician within twelve months' of her making application, if within that time she went to the office of a physician, desired him to make a physical examination to which she submitted, or received a prescription from a physician.

"The insured, having stated in her application for insurance, that she never had any protracted illness, or severe injury, or undergone any surgical operation, these statements, if untrue, increase the risk of loss as a matter of law.

"If the jury find that the insured, Bertha L. Kidder, had been obliged to consult a doctor at any time during the five years preceding her application, she having stated therein that she had not been obliged to consult a doctor 'during that time,' such misstatement increases the risk of loss and renders the contract voidable, and the same is true of her statement in the application that she had lost no time from her usual occupation on account of sickness during that time.

"If during the lifetime of Bertha L. Kidder, the defendant rescinded its contract of insurance with her and disconnected her from the defendant society and paid her back all premiums which she had paid it, it was her duty, if she desired to remain in the society, to exhaust all remedies which are provided by the constitution and by-laws of the defendant, and as she did not appeal from the decision of the local commandery as the by-laws provide, and did not exhaust all remedies provided by the defendant's rules, laws and constitution, she thereby became disconnected from the defendant order and upon such disconnection her insurance was forfeited and lost.

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"Upon all the evidence in this case the verdict should be for the defendant."

The judge refused to make any of these rulings and gave other instructions.

The defendant also asked the judge to make the following ruling:

"Bertha L. Kidder, not having paid or offered to pay or tendered the assessment which became due and payable on April 1, 1903, before midnight on April 30, 1903, she thereby became disconnected from the commandery and from the defendant order on the first day of May, and said April assessment not having been paid at any time before her death (she having died on May 26, 1903) under the laws, rules and constitution of the defendant, the said Bertha L. Kidder forfeited all claim upon the insurance and benefit fund of the defendant and your verdict must be for the defendant."

The judge refused to give this ruling, and ruled that upon this point there was nothing for the jury to consider, and that the only thing for them to consider was whether or not misrepresentations had been made by the insured in her application.

The jury returned a verdict for the plaintiff in the sum of $528.42; and the defendant alleged exceptions.

W. H. Powers, for the defendant.

G. L. Dillaway, for the plaintiff.

BRALEY, J. The questions presented by these exceptions may be taken up in the order in which they appear in the record. Among the most important is the refusal to give five requests for rulings that as matter of law the answers of the insured in her application which forms a part of the contract having been untrue, and the representations being material, the certificate of insurance either never attached, or was voidable at the election of the defendant. Under St. 1894, c. 522, § 21, as amended by St. 1895, c. 271, now R. L. c. 118, § 21, which has been held to include fraternal beneficiary corporations, unless such misrepresentations were made with an actual intent to deceive or the matter misrepresented increased the risk, they are to be deemed ineffectual either to prevent the policies from attaching, or to avoid them. *Stocker* v. *Boston Mutual Life Assoc.* 170 Mass. 224. By St. 1890, c. 421, § 27,

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now R. L. c. 119, § 22, under which the certificate in suit was issued, while this provision was made inapplicable to such insurance the doctrine of the common law was not changed, for the original statute as amended was only declaratory as to misrepresentations, and did not formulate a new rule except as to warranties. *Daniels* v. *Hudson River Ins. Co.* 12 Cush. 416, 425. *White* v. *Provident Savings Assurance Society*, 163 Mass. 108, 115. See *Campbell* v. *New England Ins. Co.* 98 Mass. 381, 401. When considering and answering the questions involving her past and present condition of bodily health, it may be said that the insured must be presumed to have been cognizant of her physical history within the period to which the inquiries were confined, and also to have known whether she had consulted, or been treated by a physician. Yet if these answers were in the negative they are not made warranties, but being representations only they would not defeat the contract unless intentionally false and material to the risk. *Daniels* v. *Hudson River Ins. Co.*, *ubi supra*. Their falsity must be found, if at all, in the extrinsic evidence, which substantially came from the physician whom she consulted, and subsequently employed, and the medical examiner of the defendant, who, after an examination, approved the application, and accepted her as an insurable risk. During the year preceding the application, the insured consulted a physician, and also is shown to have received medical advice and treatment for slight ailments in connection with her general health, the condition of which had caused her to be confined to her bed for a few days, but whether these ills should be deemed occasional, or classed as protracted in character, depended upon inferences to be drawn from the evidence. In degree their difference is apparently so marked that the jury would be justified in finding that the applicant truthfully declared she had not suffered from any prolonged sickness, and the representations that her health was perfect, and that no material facts bearing upon the subject had been suppressed, could be found to rest upon her experience of a complete recovery from the attacks of temporary sickness, and also in her reliance upon competent medical opinion that she was not suffering from any organic disease. If from the testimony of the family physician it could be said that she formerly

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had believed a serious physical trouble existed. yet it also appears that from his diagonsis this belief was groundless, and that she accepted and acted upon his opinion. Besides, this question was framed to cover actual not imaginary diseases, the supposed presence of which, until the sufferer is disabused of such belief by competent medical advice, is not uncommon. Where, however, an applicant has suffered from a disease so grave in its nature that generally it is recognized as having a tendency to shorten life, and fails to disclose the fact in answer to a question which calls for such information, it may be ruled as matter of law that as the risk is thus increased the policy is void. *Brown* v. *Greenfield Life Assoc.* 172 Mass. 498. *Rainger* v. *Boston Mutual Life Assoc.* 167 Mass. 109. So a misstatement as to age if there is a material increase of years subsequently shown has the same effect. *Dolan* v. *Mutual Reserve Fund Assoc.* 173 Mass. 197, 200. But where the insurer in reply to a question calling for the fact has not been informed of a disease which although serious may not have this tendency, it is for the jury to say whether the risk has been increased. *Hogan* v. *Metropolitan Ins. Co.* 164 Mass. 448. *Levie* v. *Metropolitan Ins. Co.* 163 Mass. 117. *White* v. *Provident Savings Assurance Society, ubi supra.* Within the last category also fall the answers to the questions relating to the consulting of physicians, or of treatment by them. The obtaining of medical advice or treatment under some circumstances may be indicative of such impairment of health as to make the patient an undesirable risk, or such acts may be only for the object of obtaining relief for common though not incurable complaints which do not result in any permanent physical derangement. It was for the jury to find under suitable instructions whether the incorrect answers to these questions were material or intentionally false. *White* v. *Provident Savings Assurance Society, ubi supra.*

There was a further inquiry in reference to her occupation which seems to have been that of a housewife, and here it also could have been determined that in so far as such a question was applicable her usual calling had not been interrupted in the sense that by reason of long continued or severe sickness she had been rendered incapable of supervision of the household or incapacitated from resuming her ordinary labor. These

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requests, therefore, were rightly refused, and the instructions given fully and accurately stated the law.

The second exception is to a refusal to rule that if during the life of the decedent the defendant rescinded the contract, and expelled or disconnected her from the order, it became her duty if she desired to continue her membership to exhaust by an appeal the exclusive remedies provided by its constitution and general laws for reinstatement. By accepting the application, issuing the insurance certificate, and recognizing her as a member by receiving dues and assessments, the defendant became bound on the face of the contract at her death to pay to the plaintiff as beneficiary the benefit provided by its terms. *Commonwealth* v. *Wetherbee*, 105 Mass. 149, 160. *Wuerfler* v. *Order of Druids*, 116 Wis. 19. While this contract contained no provision for cancellation at the option of the defendant either with or without notice to the insured, it was provided by these laws that any member who gained admission by reason of any false statements contained in the application should on conviction be expelled, but before such expulsion could be ordered the accused was entitled to be informed of the charges made against him, and to be heard in his defence. Without any previous notice giving such an opportunity, and in obedience to an order from the principal officer of the defendant, who was clothed with authority to act in its behalf, the subordinate commandery voted to return the amount previously paid for dues and assessments, and to notify the decedent that having gained admission through misrepresentation she had been disconnected. But no tender was ever made or notice communicated, because at the time the vote was passed and until death she was mortally sick and substantially unconscious. If the action taken was irregular a member under the defendant's laws would not be called upon to appeal until notice of conviction and subsequent expulsion had been received. By reason also of this condition the attempt to rescind was not perfected, and the vote of disconnection, if treated as an act of rescission, and the notice given and tender made to her sister, but who is not shown to have been authorized to act in her behalf, were inoperative for this purpose. Pollock, Con. (7th ed.) 580. See *Howland* v. *Continental Ins. Co.* 121 Mass. 499. It is un-

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necessary to express an opinion upon the validity of these proceedings, for if, without granting an opportunity of being heard before membership was declared forfeited, they could be upheld as valid until suspended by an appeal, no effective notice of disconnection having been given, there was no occasion for resorting to this remedy. Neither is any provision found that an appeal could be prosecuted in her behalf by a stranger, and this ruling also was properly refused. *Gray* v. *Christian Society*, 137 Mass. 329, 331. *Karcher* v. *Knights of Honor*, 137 Mass. 368, 372.

The third exception is to a refusal to grant a request, that a verdict be ordered in the defendant's favor because by the self executing action of one of its by-laws a failure by the decedent to pay or tender an assessment that had accrued during her sickness operated to dissolve her membership, and forfeited the insurance. While her complete physical and mental disability would not relieve her from an exact performance of this condition, a by-law embodying this specific purpose, which by reference is made a part of the certificate, holds a place in this form of insurance similar to a clause of forfeiture for a failure to pay the annual premium, after the first has been paid, as provided in contracts of regular life insurance. *Wareham Bank* v. *Burt*, 5 Allen, 113, 116. *Thompson* v. *Insurance Co.* 104 U. S. 252, 259. *Carpenter* v. *Centennial Mutual Life Assoc.* 68 Iowa, 453. *Yoe* v. *Masonic Mutual Benevolent Assoc.* 63 Md. 86, 93. *Commonwealth* v. *Wetherbee*, 105 Mass. 149. *McAllister* v. *New England Ins. Co.* 101 Mass. 558, 561. In either, such a provision is inserted for the benefit of the insurer upon whom consequently rests the burden of proving that by reason of non-compliance a forfeiture follows, either of the certificate, or of the policy. *Kingsley* v. *New England Ins. Co.* 8 Cush. 393, 404. *Hodsdon* v. *Guardian Ins. Co.* 97 Mass. 144. *Rice* v. *New England Mutual Aid Society*, 146 Mass. 248, 252. *Lyon* v. *Royal Society of Good Fellows*, 153 Mass. 83, 84. *Waterworth* v. *American Order of Druids*, 164 Mass. 574. *Campbell* v. *Knights of Pythias*, 168 Mass. 397, 400. *Petherick* v. *Order of Amaranth*, 114 Mich. 420, 423. *Ferguson* v. *Union Ins. Co.* 187 Mass. 8. *Harris* v. *North American Ins. Co.* 190 Mass. 361, 369.

But if under the present certificate lapse of membership by

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a failure to pay the regular monthly assessments works a forfeiture of the contract, this defence is not open to the defendant as it has not been pleaded, and it cannot be raised under an answer which as to this issue contains only a general denial. R. L. c. 173, § 27. *Mulry* v. *Mohawk Valley Ins. Co.* 5 Gray, 541, 543. *Orrell* v. *Hampden Ins. Co.* 13 Gray, 431, 434. *Thayer* v. *Connor*, 5 Allen, 25. *Hodsdon* v. *Guardian Ins. Co.* 97 Mass. 144. *Pitt* v. *Berkshire Ins. Co.* 100 Mass. 500, 503. *Perley* v. *Perley*, 144 Mass. 104, 107. *Freeman* v. *Travelers' Ins. Co.* 144 Mass. 572, 578. *Shea* v. *Massachusetts Benefit Assoc.* 160 Mass. 289. It, therefore, becomes unnecessary to determine whether after the defendant not only had unreservedly declared that the membership of the insured was terminated and the contract repudiated, but also had ordered the subordinate commandery, which was bound to obey its commands, not to receive further dues or assessments either from the insured or from any person acting in her behalf, further tender of performance within the time elapsing between the vote and her death had been waived, or whether the defendant had become estopped from making such defence. The exception to the refusal to give this ruling cannot be sustained, and the ruling given, that upon this issue there was no question of fact for the jury to determine, as they were only to decide whether false representations had been made, was correct.

Exceptions overruled.

EBEN D. JORDAN & others, executors & trustees, *vs.* JAMES C. JORDAN.

Suffolk. March 21, 1906. — June 20, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, BRALEY, & SHELDON, JJ.

Trust. Capital and Income. Agent, Commission. *Broker.*

Where an estate of great value, nearly one third of which consists of real property, is held under the provisions of a will by trustees having large discretionary powers as to investments and the management of the estate, in trust to pay the income to certain beneficiaries during a period fixed by the will with a remain-

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der over, if the trustees find it expedient from time to time to make extensive alterations in the real property in order to obtain tenants and to render the whole estate productive so that the income can be kept at a fixed standard or increased in amount, the expenses incurred by the trustees in good faith for these purposes properly can be paid out of the income of the estate without charging any part of them to capital, although incidentally the immediate value of the buildings may have been increased by the improvements.

Where an estate of great value, nearly one third of which consists of real property, is held under the provisions of a will by trustees having large discretionary powers as to investments and the management of the estate, in trust to pay the income to certain beneficiaries during a period fixed by the will with a remainder over, and where the testator in his will expressed his high opinion of permanent investments in real estate and suggested to the trustees that before making any sale under the power given them in the will they should fully consider the expediency of doing so, and where also during the existence of the trust the net income of the entire estate has been reasonably adequate for the purposes of the trust and has been paid to the beneficiaries from the time of the testator's death, if the estate includes several parcels of realty left by the testator which have been either entirely unproductive or have not produced sufficient income to pay taxes and the cost of maintenance, although it is the duty of the trustees to convert this unproductive property into a fund that will produce revenue without unnecessary delay, until such conversion they are justified in paying from the general income of the estate all charges necessary in carrying the unproductive realty; and, if within a period of five years after the death of the testator they sell certain of these unproductive parcels at a profit above the inventory valuations, the proceeds of such sales belong to capital without any deduction in favor of income by reason of delay in the conversion of the property, such delay having been contemplated by the testator.

The rule long settled in this Commonwealth that a commission paid by a trustee to a broker for negotiating a sale of personal property belonging to the trust is to be charged to income and not to capital applies equally to the payment of a broker's commission for negotiating a sale of real estate belonging to the trust.

APPEALS, filed in the Supreme Judicial Court on June 15, 1905, by James C. Jordan, one of the life beneficiaries under the will of Eben D. Jordan, late of Boston, from decrees of the Probate Court for the county of Suffolk allowing the accounts of the trustees under that will.

There were six accounts filed by the trustees, covering the period from November 15, 1895, the date of the death of the testator, to October 30, 1900.

Objections were filed by James C. Jordan, the appellant, to these accounts as well as to accounts filed by the executors. The matter was referred to John C. Gray, Esquire, as auditor, who made a report. Thereafter the matter came before the Probate Court, and the entry of the decrees appealed from was consented

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to by the appellant "except in so far as items involved questions as between capital and income."

The appeals came on to be heard before *Braley*, J., who at the request of the parties reserved them on the pleadings (omitting the schedules annexed to the objections), the will, the auditor's report so far as it related to the questions raised by the appeals, a stipulation and a statement of the facts admitted, for determination by the full court, such decrees to be entered as equity and justice might require.

The following facts by agreement were taken as admitted at the argument: The testator's widow survived him, and died in February, 1897. Four children of the testator survived him, and now are living, namely, James C. Jordan, Eben D. Jordan, Jr., Julia M. Dumaresq and Alice M. Foster. No child of the testator died before him leaving issue. The appellant had two daughters of his first marriage, both of whom are living. The testator died seised of vacant lands in Brookline and Boston in addition to the lands in regard to which the questions were raised which are considered in the opinion.

The following provisions of the will relate to the duration and termination of the trust:

". . . And upon the further trust at the end of said period of suspension to pay, transfer and convey to each descendant then living of said James C. Jordan, Eben D. Jordan Junior Julia M. Dumaresq or Alice M. Foster as the case may be for whose benefit a general share or a part of a general share shall then be held in trust under this my will or who has been receiving income from any general share or part of a general share, the general share or the part of the general share itself held in trust for his or her benefit or of which he or she received the income in either case discharged of all trusts. . . .

"And provided further that the words 'son' 'daughter' 'child' 'children' 'brother' 'sister' 'issue' 'lawful issue' 'descendant' 'beneficiary' 'heir at law' 'next or nearest of kin' or other word or words wherever used in this will, whether hereinbefore or hereinafter with reference to persons descended from my said son James C. Jordan shall in all cases be taken to refer only to such persons as shall have descended from the said James and his said former wife Helen L. Jordan and in no instance to those

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persons, if any, who shall have descended from said James and his present or any other wife except said Helen it being my intention to exclude from sharing in any part of my property whether principal or income any and all children issue or descendants however near or remote of my said son James, except his said daughters by his said former wife Helen L. Jordan and their respective issue and descendants.

"Said period of suspension shall be and continue from the time of my death during the lives of such of my lawful descendants as shall be living at the time of my death and during the lives and life of the survivors and survivors [*sic*] of them and for twenty years after all of them shall have died, whether such descendants living at the time of my death shall be a child or children and grand child or grand children and great grand child or great grand children and more remote issue of mine, or shall embrace less generations."

The following article of the will is referred to in the opinion as a "cautionary direction":

"Article Twenty-fourth: — I think after a long experience on the subject, very highly of real estate as a permanent investment and I suggest that the executors or executor or administrators or administrator for the time being under this my will and the trustees or trustee for the time being thereunder, fully consider the expediency of making any sale of real estate, under the power given in and by this will, before making sale thereof, but this is only by way of suggestion, and is not in any manner whatsoever to control, lessen, impair or affect the power to sell real estate hereinbefore given in and by this will."

Other portions of the will necessary for a proper understanding of the decision of the court are quoted or described in the opinion, where also other material facts are stated.

C. K. Cobb, for the trustees.

C. E. Rushmore, (of New York,) (*L. D. Brandeis* with him,) for James C. Jordan, appellant.

R. F. Sturgis, for Charles S. Rackemann, guardian *ad litem*.

BRALEY, J. By the will of the testator after devising in article fifth his mansion house to his wife, the residue of the estate consisting of real and personal property to a large amount is given to trustees "in trust to manage and invest the same in

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a careful and prudent manner and receive the income therefrom and after deducting and paying from said income all taxes and other charges incident thereto including a reasonable compensation to the trustees . . . to pay to my said wife out of the remainder of said income in case she shall survive me, the yearly sum of twenty-five thousand dollars . . . during the term of her natural life." He then proceeds, subject to this provision, to provide for his four children and their issue, which as to his son James included only the children by his first wife, by further directing the trustees "to divide all said rest residue and remainder of said estates and property . . . into such a number of equal shares that there shall be one share to be held in trust for the benefit" of each of them. Upon such division being made it then becomes the duty of the trustees "to manage such general share in a careful and prudent manner and invest from time to time in a careful and prudent manner such part thereof as may be uninvested and collect and receive the income from such general share and after paying from the income of such general share, all taxes and other charges incident to such general share including a reasonable compensation to the trustees for the time being for their services in respect to such general share, to pay the residue of the income of such general share to the son or daughter of mine for whose benefit such general share is held in trust." But it is further provided if the trustees find it inconvenient this division need not be made, and only his or her proportionate share of the income need be ascertained and paid over to the beneficiary. This course has been followed as the trustees thus far have treated the estate as undivided. In article sixteen their discretionary powers are defined in these words: "Full power and authority are hereby given to the trustees for the time being under any article of this my will to change from time to time the investment or reinvestment of the whole or of any part of the property held in trust by such trustees and for this purpose to sell the whole or any part thereof at public auction or by private sale and for such consideration and on such terms as such trustees . . . shall deem expedient and convey the same by good and sufficient deed or deeds in fee or other transfers or conveyances to the purchaser or purchasers discharged of all trusts and receive the proceeds of such sale, but such proceeds

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shall be invested . . . in such other property as they shall deem safe and prudent investments, but to be held upon the same trusts. . . ." A portion of the personalty has been converted into realty by a purchase of the premises described as the "Park Square tract," and by building an apartment house called "Trinity Court," and while three parcels of real property of which he died seised have been sold, the fee in one has been acquired under the foreclosure of a mortgage held by the testator at his death. With these exceptions and the transfer in compliance with a contract of the testator of certain shares of corporate stock out of a large number owned by him, and the liquidation of his interest in the mercantile firm of which he was a member, there appear to have been no substantial changes in the form of the property as received by them. The widow has since deceased, but the children survive, and from time to time the trustees have rendered accounts of their trust in which receipts, expenditures and investments are shown, and while apparently assented to by the other beneficiaries, the appellant, who originally objected to their allowance on many grounds that under the appeal have become eliminated, still contends that the first six accounts should be reformed so that certain sums paid from income should be charged to capital. These objections rest upon two grounds, either that the items now in dispute for repairs, alterations and improvements were of such a permanent character that they should have been so charged, or that if the taxes and maintenance of any separate parcel exceeded the income therefrom, the deficit should not have been finally supplied from the general income, but upon sale of the land should have been taken from principal.

In adapting, after completion, the basement, first story, and other parts of the building erected by them, by providing an elevator, building a stairway, with other minor changes, and furnishing additional equipment of lighting, heating and plumbing, and in remodelling and fitting the third story of another building left by the testator, for the purpose either of securing tenants, or for their accommodation, many changes or improvements were made, some of which it is now contended have been permanent in character. These alterations increased the rental value of the property, and if the total cost both of construction

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and equipment, of which these items form only a part, come out of the remaindermen, then as no part of this burden is borne by the beneficiaries for life they would receive a benefit wholly at the expense of those who ultimately would participate in a division of the estate at the determination of the trust. Under the large discretionary powers conferred, the trustees, in the exercise of a sound business administration, might find it expedient from time to time to make extensive alterations in the real property in order to obtain tenants and render the whole estate productive, so that the income could be kept either at a fixed standard or increased in amount. They are found by the auditor to have acted in good faith, and with reasonable judgment in deciding that these changes were advisable. Because of some of these alterations, the buildings may have been intrinsically more valuable than before, and in a certain sense the alterations are permanent in character, but already there has been a partial restoration of one building to its original condition at the expense of capital and what other changes may be reasonably required in the future to obtain and keep tenants cannot of course be anticipated.

In the management of such property details of administration must be left very largely to the sound discretion of those entrusted by the testator with its development as a source of revenue, and, these disbursements having been found justifiable, the apportionment by the trustees so far as it is now in dispute does not appear to have been erroneous. After making an adjustment as to all expenditures which clearly belonged either to capital or income, there remain those in dispute, and these charges though debatable they paid from income. But upon consideration of the principal object sought, which was to retain or increase rental values, no satisfactory reason is shown why these several outlays should not as a whole be treated as being in the nature of occasional repairs or improvements, which did not permanently increase the value of the inheritance, but did enhance income, and to the payment of which capital that already had borne what was plainly deemed its proportional legitimate part should not be made further to contribute. *Sohier* v. *Eldredge*, 103 Mass. 345, 351. *Little* v. *Little*, 161 Mass. 188, 202. This may be said to be in accordance with the

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general rule that, in the absence of a different testamentary direction or of an agreement as to apportionment between the tenant for life and the reversioner, ordinarily taxes, insurance, and all incidental expenses of the maintenance of real property, which forms a part of an estate held in trust, whether left by a testator or purchased by the trustees, are to be paid from income. *Parsons* v. *Winslow*, 16 Mass. 361, 368. *Little* v. *Little*, *ubi supra*. *Holmes* v. *Taber*, 9 Allen, 246. *New England Trust Co.* v. *Eaton*, 140 Mass. 532. *Plympton* v. *Boston Dispensary*, 106 Mass. 544. *Mandell* v. *Green*, 108 Mass. 277. *Bridge* v. *Bridge*, 146 Mass. 373, 376. The case of *Stone* v. *Littlefield*, 151 Mass. 485, which the appellant suggests supports a different doctrine, is not in conflict. In that case the ordinary rule that taxes should come out of income was not followed, because they had become a lien on the property when the trustee acquired title under the foreclosure of a mortgage taken by the testator, and their payment was necessary before a satisfactory title could be given to the purchaser to whom he afterwards sold. Upon a sale under such conditions capital either receives the benefit of any gain, or must bear the burden of any loss, and the trustee therefore could not at the expense of income retain the amount of the taxes in anticipation that a sale in fee by him would not produce enough to satisfy the mortgage debt with the incidental disbursements. *Worcester City Missionary Society* v. *Memorial Church*, 186 Mass. 531, 539.

Included in the estate were several parcels of realty left by the testator, which taken separately have either been entirely unproductive, or have not produced sufficient income to pay taxes and costs of maintenance, and the trustees have supplied this deficiency from the income received from the remainder of the property. While the two investments in realty made by the trustees need not be considered, as each has yielded sufficient returns to pay taxes and expenses, and the propriety of the purchase of the estate in Park Square is now unquestioned, a sale at a profit above the inventory having been made within a period of five years elapsing after the testator's death of three parcels of the unproductive real estate, an argument also is urgently pressed that out of the proceeds enough should

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then have been transferred to income to cover any loss occasioned by this delay. It is settled that trustees without unnecessary delay are to convert unproductive property received from a testator into a fund which will produce revenue, and when so created the right of the life tenant to the income is to be ascertained, and the income computed from the time of the testator's death. *Edwards* v. *Edwards*, 183 Mass. 581, 583, and cases cited. In that case on which the appellant strongly relies the testator directed that his property, the bulk of which consisted of unproductive land, and of speculative investments in stocks carried on margins, should be converted into sound securities, and after paying a small annuity to his son and daughter-in-law the remainder of the income was to go to his wife for life. It is obvious that his sole purpose was to create a permanent fund safely invested, the returns from which should be immediately available for their support. But in the present case the life tenants were not dependent upon the testator, and the scheme of the will plainly indicates that he anticipated that the establishment of the trust fund even before any division into shares became advisable might be prolonged in time. The trustees were not required to divide the estate, which was not only of great value, but nearly one third of which consisted of real property, into "separate and distinct shares" if such division was found inconvenient or inexpedient. If this was not done, the testator's direction was, "then so long as it shall not be necessary to actually divide the same to hold the same in undivided general shares," which included these particular investments made by the testator. The cautionary direction found in the twenty-fourth article of his will, while not absolutely binding upon them, is indicative that he contemplated that his trustees if they followed his judgment might delay the conversion. *Harvard College* v. *Amory*, 9 Pick. 446, 462. If they adopted this course then their action was in accordance with his suggested intention, and when any of these parcels were converted into money the life tenants were not entitled to have any part of the proceeds treated as income and deducted before the whole fell into principal, for being in receipt of the net income from the entire trust as constituted by him, which is not only shown to have been reasonably adequate, but has been paid to them from the

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time of his death, they were realizing all the benefit therefrom which he intended, even if a part of the estate during this time remained barren. *Lovering* v. *Minot*, 9 Cush. 151, 158. *Eldredge* v. *Heard*, 106 Mass. 579. *Green* v. *Crapo*, 181 Mass. 55. *Edwards* v. *Edwards*, *ubi supra*.

A further objection is taken to the payment from income of a broker's commission for negotiating the sale of a parcel of improved realty, but there would seem to be no difference in principle between such a sale, and a similar method of disposing of personalty by trustees, where it has been held that such an appropriation from income was authorized. *Heard* v. *Eldredge*, 109 Mass. 258. If the question were open, objections which perhaps could be soundly urged against this rule would call for careful examination, but the rule has been so long settled, and presumably followed by trustees, that it ought not to be disturbed. See *New England Trust Co.* v. *Eaton*, 140 Mass. 532, 545.

Decrees are to be entered affirming the decrees of the Probate Court.

Ordered accordingly.

WILLIAM T. DEFRIEST & another *vs.* RICHARDS M. BRADLEY & another, trustees.

Suffolk. March 22, 1906. — June 20, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Landlord and Tenant. Evidence, Extrinsic affecting writings. *Equity Jurisdiction. Estoppel.*

If a lease for four years contains a reservation by the lessor of the right to cancel the lease by giving a certain notice and paying a stipulated amount of money, and contains no provision for renewal, and if the parties to the lease before its expiration make an agreement in writing extending the lease for a further period of five years and stipulating that "all provisions, agreements, terms and conditions in said lease . . . shall apply to said term as extended," this continues the lease for a period of nine years from its date and leaves all of its provisions in force including the lessor's right of cancellation, although before the extension took effect the lessee made improvements on the premises at a large expense with the knowledge and consent of the lessor and relying upon

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and induced by an oral agreement of the lessor that if the improvements were made the lease should be extended for a further term of five years and the lessor would permit the lessee to occupy the premises during the whole of the extended term.

An agreement in writing between a lessor and a lessee made before the expiration of the term, extending the lease for a further period of five years and stipulating that "all provisions, agreements, terms and conditions in said lease . . . shall apply to said term as extended," is free from ambiguity and cannot be varied by evidence of an oral agreement that the lessor shall not exercise a right reserved by him in the lease to terminate it by giving a certain notice and paying a stipulated amount of money.

A lessee has no remedy in equity to enjoin his lessor from exercising a right to terminate the lease, which was given to him by its terms and has been continued by an agreement in writing extending the period of the lease, on the ground that before the extension took effect the lessee made improvements on the premises at a large expense with the knowledge and consent of the lessor, relying upon and induced by an oral agreement of the lessor that if the improvements were made the lease should be extended and the lessor would permit the lessee to occupy the premises during the whole of the extended term.

BILL IN EQUITY, filed October 30, 1905, by William T. DeFriest of Boston and the William J. Lemp Brewing Company, a corporation organized under the laws of the State of Missouri, against the trustees under the will of John D. Williams, late of Boston, to enjoin the defendants from cancelling a lease of a brick building numbered 28 and 30 on Avery Street in Boston made by the defendants' predecessor in the trust to the plaintiff DeFriest who afterwards assigned his rights therein to the plaintiff corporation.

In the Superior Court the case was heard by *Fessenden*, J. The material portions of the lease were contained in its granting and habendum clauses, which were as follows:

"This indenture, made the ninth day of May in the year nineteen hundred, between Richards Bradley, trustee under the will of John D. Williams, late of Boston (hereinafter called the lessor) of the one part and William T. DeFriest of Boston, Mass. (hereinafter called the lessee) of the other part

"Witnesseth, that in consideration of the covenants herein contained, on the part of the said William T. DeFriest and his representatives, to be kept and performed, the said Richards Bradley, trustee doth hereby lease unto the said William T. DeFriest the brick building numbered twenty-eight (28) and thirty (30) Avery Street in said Boston, reserving unto himself and his representative the right to cancel this lease at any time

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by paying the said lessee the sum of three thousand (3000) dollars if cancellation takes effect during the first year and a half of the term hereof and by paying him the sum of fifteen hundred (1500) dollars if cancellation takes effect subsequent to the above mentioned period: provided that said lessor shall give written notice of intention so to cancel said lease three months in advance, said written notice to be delivered to said lessee or mailed with address to said lessee on said premises; except in case the taking of the whole or any part of said leased premises is authorized by public authority, in which case the lease may be cancelled at once by written notice to that effect addressed and mailed or delivered as above provided; payment of three thousand (3000) dollars or of fifteen hundred (1500) dollars, according to time of cancellation, as above provided, to be due from said lessor to said lessee upon such cancellation.

"To have and to hold the said premises hereby leased unto the said party of the second part and his representatives, from the first day of May in the year nineteen hundred and one during the full term of four years thence next ensuing."

The agreement of extension referred to in the opinion was as follows:

"It is hereby agreed that the term of a certain lease dated May 9, 1900, between Richards Bradley, trustee under the will of John D. Williams, as lessor, and William T. DeFriest, as lessee, shall be extended for the period of five years from the expiration thereof, so that the term of said lease as extended shall extend to and expire on the 30th day of April, 1910; and all provisions, agreements, terms and conditions in said lease and the assignment thereof to The William J. Lemp Brewing Company, which assignment is dated December 18, 1901, shall apply to said term as extended.

"Witness our hands and seals this sixth day of November, 1903."

Here followed the signatures of the trustees under the will of John D. Williams and of the plaintiff DeFriest, below which was an assent to the extension executed by the plaintiff corporation as assignee of the lease.

On July 6, 1905, the following notice of cancellation signed by the defendants was sent to the plaintiff DeFriest:

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"Dear Sir:

"By virtue of the provisions of the lease to you, dated May 9, 1900, from Richards Bradley, trustee under the will of John D. Williams, which lease was on November 6, 1903, extended to April 30, 1910, we, the lessors of the leased premises hereby notify you of our election to cancel the lease, said cancellation to take effect October 31, 1905.

"Pursuant to the terms of the lease there will be due from us on said date when said cancellation is to take effect, the sum of fifteen hundred (1500) dollars, and that amount we will pay over at that time."

Afterwards a tender of $1,500 was made by the defendants and refused by the plaintiffs.

The judge made the following findings of fact:

"In July, 1903, the plaintiff DeFriest, being in possession of the premises described in the bill in this suit under the lease a copy of which is annexed to the bill, and desiring to extend his business, entered upon negotiations for an extension of the term of the lease. The negotiations were all oral. The defendants seasonably objected to the admission of the evidence; but I admitted it, subject to the objection and exception of the defendants. DeFriest requested the lessors to make certain alterations and improvements on the leased premises. The lessors declined so to do unless he would pay the expense thereof. He told them that he would not as he would have to carry on the business for some time at a loss, that he would be put to considerable expense in making the alterations and improvements, that he would have to borrow the money therefor, that the lease had only about a year and a half to run, that the business would be interrupted while the changes were being made and that he could not get the money back in the time during which the lease was to run. They offered him three years more in addition to the term of the lease; but he declined this saying that he could not get the money back and that he would not make the improvements unless they gave him five years' extension of the lease.

"Early in September of the same year the lessors informed him that they had decided to give him the five years, and to

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allow him one month's rent ($250.00) for the interruption to his business. Nothing was said about the right to cancel the lease as provided in the lease, and the plaintiff did not understand that the lessors had such right. It was understood that the assignment to the Lemp Brewing Company and the guaranty of that company were to apply to the extension.

"Early in October DeFriest began the alterations and improvements. He completed them in November. The lessors knew of the beginning and the progress of the work, which was inspected from time to time by their representatives.

"He expended about $1600 on them, and also about $600 in equipping his restaurant.

"During the first year after he began the enlarged business he lost about $2000. There was no profit from the new business until after the expiration of eighteen months from the time he began carrying it on. It has become profitable. The lessors have not made any objection to the business or his method of conducting it. He borrowed $4900 of the Lemp Brewing Company to cover his losses and the expense of the alterations and improvements. This was contemplated when he began the changes.

"The lessors executed the extension instrument about November 6, 1903, and while the alterations and improvements were being made, and it was left with H. E. Warner, Esquire, in escrow until March, 1904, when, the work having been completed and the term for claiming mechanic's liens having expired, it was delivered. Mr. Warner acted as attorney for the Lemp Brewing Company when the extension was prepared and signed, and looked after the interests of that company and DeFriest.

"I do not find any waiver or estoppel on the part of the lessors.

"The several instruments and notices annexed as exhibits to the plaintiffs' bill were duly executed and delivered.

"At the request of the plaintiffs' counsel I state that Mr. DeFriest gave his testimony in an honest and truthful manner and told the truth."

The judge under Chancery Rule 35 appointed a commissioner to take the evidence and report it to this court. Afterwards he made a final decree that the bill be dismissed without prejudice

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to any remedies that the plaintiffs might have at law. The plaintiffs appealed.

The case was argued at the bar in March, 1906, before *Knowlton*, C. J., *Morton*, *Lathrop*, *Braley*, & *Sheldon*, JJ., and afterwards was submitted on briefs to all the justices.

H. E. Warner, (*G. C. Dickson* with him,) for the plaintiffs.

R. S. Gorham, for the defendants.

BRALEY, J. The original lease contained neither a covenant for renewal, nor an agreement for an additional term at the election of the lessee. If the last provision had been inserted, and the option had been exercised, there would have been a present demise to take effect at the expiration of the first term, and no subsequent agreement or second lease would have been necessary. *Stone* v. *St. Louis Stamping Co.* 155 Mass. 267, 270. The leasehold estate would have been thus prolonged to the end of the entire period, subject to all the conditions and covenants, including that of the right of the lessor to cancel the lease at his pleasure upon giving written notice and paying the stipulated sum which was to be graduated in amount according to the time the lessee had occupied the premises. *Dix* v. *Atkins*, 130 Mass. 171. *Toupin* v. *Peabody*, 162 Mass. 473. It was, however, within the contractual power of the parties by a later arrangement to prolong the term although the lease was silent on this subject, and this was done by an instrument which has been referred to as the agreement of extension, which was executed and became operative before the term provided for in the lease had expired. In legal effect this agreement operated to extend the term as effectually as if its principal provision had been inserted in the lease in the form of an option of extension for a further definite period at the election of the lessee, who subsequently made such an election. By either way, then, the result is the same, for the original demise is thereby lengthened to cover the longest time named. The lease and the agreement, therefore, must be construed together and considered in their entirety as forming the contract between the parties. This, with an exception presently to be noticed, is not denied by the plaintiffs, as they aver in their bill that all the covenants and agreements to be kept by them have been performed. The exception is the reservation of the right to cancel the lease,

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of which the lessors by a proper notice having signified their intention to take advantage, this bill is brought for the purpose of enjoining them from enforcing a cancellation.

From the facts which are not in dispute it is manifest that the plaintiff DeFriest made the improvements on the premises at a large expense with the knowledge and consent of the defendants, and upon an oral understanding with them that if this was done by him the lease should be extended for a further term of five years. During these negotiations and in the oral agreement there was no reference whatever made to the right of cancellation, and from the testimony of the lessee, which is stated in his findings of fact by the presiding judge before whom the case was tried to have been entitled to full credence, it is apparent not only that he expended his money in good faith relying upon the representations of the defendants that if he did so they would permit him to occupy the premises for the entire term, but also that such expenditures would not have been made if he had understood that they still claimed the right to terminate his tenancy at their will. If the written agreement had merely prolonged the term without further details, and the defendants then had attempted to enforce a cancellation, the plaintiffs would have been able to defeat a forfeiture by proof of the oral agreement, from which it could have been found that it was not within the contemplation of the parties to keep this condition alive, as its enforcement would defeat the object for which the extension was granted. *Durkin* v. *Cobleigh*, 156 Mass. 108, 109. But where after preliminary verbal negotiations have taken place the parties finally put their contract in writing, an independent contemporaneous oral agreement relating to the subject matter which is inconsistent with the terms of the instrument cannot be given effect to vary or modify its provisions. *Thomas* v. *Barnes*, 156 Mass. 581, 583. This principle, however, is not in conflict with another well settled rule upon which the plaintiffs rely, that for the purposes of interpretation and application of the terms of a contract evidence showing the subject matter with which the parties dealt, the object which they sought to accomplish, as shown by the preceding negotiations, is competent, not to vary what has been reduced to writing, but to aid in its construction and to make plain in

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what sense the parties used and understood the language they employed. *Palmer* v. *Clark*, 106 Mass. 373, 387. *Keller* v. *Webb*, 125 Mass. 88, 89. *Proctor* v. *Hartigan*, 139 Mass. 554. *Bassett* v. *Rogers*, 162 Mass. 47, 51; *S. C.* 165 Mass. 377. *Alvord* v. *Cook*, 174 Mass. 120, 122, 123. *Lynn Safe Deposit & Trust Co.* v. *Andrews*, 180 Mass. 527, 534. *Hebb* v. *Welsh*, 185 Mass. 335. But this rule is inapplicable.

Upon recurrence to the agreement it purports in clear and comprehensive language to grant an extension of the demised term, subject to "all provisions, agreements, terms and conditions in said lease" and in this form it was prepared by the plaintiffs' attorney and submitted to and signed by the defendants, and was left in escrow with the plaintiffs' attorney until after the time had expired during which mechanics' liens might have attached, when it was delivered to the plaintiffs at the completion of the improvements. See *Nickerson* v. *Massachusetts Title Ins. Co.* 178 Mass. 308, 311. Neither upon the face of this instrument, if considered independently, nor when read in connection with the lease is there any ambiguity of expression, any more than there is in the lease itself, concerning the matter in dispute. That according to the understanding of the lessee, when the term was extended, there should have been an exception inserted stating that all of the covenants and obligations of the lease should continue in force except the lessors' right of cancellation, is not sufficient. Under the guise of construction by invoking the previous conduct and language of the parties the normal meaning of words cannot be explained away in equity any more than at law, even if by giving them their common signification it may result, as in the present case, in allowing one party to the contract to obtain an advantage which otherwise would be inequitable. *Kelly* v. *Cunningham*, 1 Allen, 473, 474. *Violette* v. *Rice*, 173 Mass. 82, 84, and cases cited. After receiving evidence of the attendant circumstances by which to determine whether the written contract expressed the intention of the parties, it is then to be determined whether the part of the contract alleged to have been omitted is covered by the writing. If it is, parol evidence is inadmissible. *Goode* v. *Riley*, 153 Mass. 585. *Benson* v. *Gray*, 154 Mass. 391, 395. *Reynolds* v. *Boston Rubber Co.* 160 Mass. 240, 245. *Menage* v.

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Rosenthal, 175 Mass. 358. *Boruszweski* v. *Middlesex Assur. Co.* 186 Mass. 589. There is no suggestion that the execution and acceptance of the agreement by the plaintiffs was procured by the fraud or misrepresentation of the defendants, neither is there evidence that since then in reliance either upon their conduct or representations the plaintiffs have been led or induced to change their position for the worse so that neither a waiver of this part of the contract nor an estoppel which prevents its enforcement is shown. *Stiff* v. *Ashton*, 155 Mass. 130. Nor were they concluded by the negotiations before the written agreement was reached, upon the view advanced by the plaintiffs that this provision having thus either been waived or the defendants estopped, it had ceased to be operative, and therefore was not included, as the undisputed language of the agreement itself affirms this right. *Kent* v. *Warner*, 12 Allen, 561, 563. *Batchelder* v. *Queen Ins. Co.* 135 Mass. 449, 450. *Metropolitan Coal Co.* v. *Boutell Transportation & Towing Co.* 185 Mass. 391.

Under our construction of the agreement, as we have said, it operated to continue the leasehold estate for the full term of nine years from the date of the lease, subject, of course, to the essential covenants and stipulations, and the notice given to the lessee that the defendants elected to take advantage of the right to cancel, having been preceded by a tender of the amount required if cancellation took place after the first year and a half of the term had expired, had the effect of terminating the lessee's estate and interest in the premises. A majority of the court are of opinion that the entry must be,

Decree affirmed.

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FRED J. TABER *vs.* CHARLES H. BRECK, executor, & others. SAME *vs.* SAME.

Suffolk. March 23, 26, 1906. — June 20, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, BRALEY, & SHELDON, JJ.

Equity Pleading and Practice, Master's report, Hearing before master, Election of remedy. *Equity Jurisdiction. Partnership. Election. Contract*, Implied: common counts.

Where in a suit in equity the case is referred to a master under an order of court which does not require a report of the evidence but only of such facts and questions of law as either party may request, and the master makes a full report setting forth the facts on which his rulings of law are based, he is not obliged to report the evidence on which his conclusions of fact were reached.

Where a master is not required to report the evidence on which his findings of fact are based and does not report it, a finding by him that certain oral contracts alleged by the plaintiff were not proved is final.

Where in a suit in equity a master is not required by the order of reference to report the evidence on which his findings of fact are based and does not report it, a finding by him, upon a claim by the plaintiff for compensation for services alleged to have been rendered by the plaintiff to a firm of which he had been a member, that the plaintiff after a certain date was acting as a member of the firm and not as an employee and that his employment had ceased at a previous date, is final.

Where a member of a business partnership organized in the form of a trust with transferable shares, who also is employed by the partnership at a salary, has made an agreement in writing with a copartner that whenever he leaves the employ of the company he will sell and convey his shares to his copartner at a certain price which the copartner agrees to pay, and subsequently gives a notice in writing under the contract that his employment has ceased, offers to transfer his shares, demands a settlement, and about two years afterwards brings a suit in equity to enforce the contract specifically and compel the payment to him of the agreed price for his shares, he cannot also maintain another suit in equity against his copartners or their representatives for an accounting for the profits accruing from his shares after the date on which he offered them to his copartner under the contract which he is seeking to enforce specifically.

Where a member of a business partnership organized in the form of a trust with transferable shares, who also is employed by the partnership at a salary, has made an agreement in writing with a copartner that whenever he leaves the employ of the company he will sell and convey his shares to his copartner at a certain price which the copartner agrees to pay, and subsequently gives a notice in writing under the contract that his employment has ceased, offers to transfer his shares and demands a settlement, but, instead of acually severing his connection with the company after giving his notice, continues to render services which are of value to the company and are performed with the knowledge of the representatives of his copartners and without any dissent from them, until they

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finally discharge him, when he brings a suit in equity to enforce the contract specifically and compel the payment to him of the agreed price for his shares, he is entitled in another suit in equity to recover from the members of the partnership the reasonable value of his services from the time of his giving the notice to the time of his discharge.

When by an order of court in a suit in equity the case has been recommitted to a master to report further on certain points named in the order, a motion that the whole case be reopened for the introduction of further evidence must be addressed to the court and not to the master, and the denial of such a motion by the master is not a matter of exception to his report.

TWO BILLS IN EQUITY, filed in the Superior Court respectively on March 31 and April 17, 1903, both by Fred J. Taber of Boston against Charles H. Breck, as executor under the will of Luther Adams, late of Newton, and also as principal trustee and shareholder in a partnership organized under a declaration of trust and carrying on a wholesale liquor business under the name of Adams, Taylor and Company,* and Clarence A. Barney, a shareholder in the same partnership, the first bill praying (1) that an account might be taken between the plaintiff, as a former shareholder in the partnership, and the defendants in accordance with alleged agreements of Adams set forth in exhibits annexed to the bill, (2) that the defendant Breck as executor might be ordered specifically to perform these agreements, (3) that there might be an assessment of damages caused by the defendant Breck's failure to perform the agreements, (4) that the defendant Breck as executor might be enjoined from selling, transferring or bringing any action at law or suit in equity upon a certain promissory note of the plaintiff dated January 1, 1900, and (5) for further relief; and the second bill praying, (1) for an account of the business done and profits earned by the partnership of Adams, Taylor and Company from December 31, 1897, to March 21, 1903, (2) that any salary due to the plaintiff for services and the fair value of services rendered by him to Adams, Taylor and Company might be ascertained by a jury and the defendants as such partnership be ordered to pay the same, and (3) for further relief.

The cases were referred to James D. Colt, Esquire, as master, who filed a report. Later the cases came before *Fox*, J. upon a motion of the plaintiff that the master be ordered to report cer-

* See 183 Mass. 133.

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tain exceptions, findings and evidence. The judge ordered that the cases be recommitted to the master for the purposes named below, and made the following memorandum of decision:

"1. The plaintiff requested the master to report his exceptions to the admission and exclusion of evidence. The master says that there are more than one hundred such exceptions scattered through eighteen printed volumes, and that to do as requested would necessitate reporting all the evidence. The plaintiff has not specified, either before the master or before the court, the particular exceptions on which he relies, nor shown that any of them are material in view of the facts found. While it may be true that the master's rulings on evidence are subject to review by the court, it is not the master's duty to prepare and report a bill of one hundred exceptions without aid from counsel.

"2. The plaintiff filed one hundred and twenty-one objections to the master's report, and in an argument before me, which continued for more than four hours, his counsel claimed and exercised the right of reading the testimony at length for the purpose of showing that it did not justify the master's findings. I am not satisfied that it is necessary to report the evidence for the purpose of raising any legal question, or for the purpose of saving any of the plaintiff's legal rights. The rule to the master requiring him to report such facts and questions of law as either party may request does not require him to report immaterial facts and mere moot questions. The rule also provides that the master is not to report the evidence without a special order of the court. It is not open to counsel, under the guise of saving his law, to convert a matter of discretion into a matter of legal right.

"3. Suit No. 1312 is a suit by Taber against Breck as executor of the will of Adams, to compel specific performance of certain written agreements under which Adams agreed to repurchase from Taber certain shares of stock in the firm of Adams, Taylor and Company whenever Taber should leave their employ.

"Suit No. 1349 is a suit by Taber against Adams, Taylor and Company to recover compensation for his services while in their employ.

"The principal questions in controversy are apparently these:

"First, Whether there were any oral agreements between the

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parties enlarging the rights which the plaintiff had under his written agreements.

"The master has found against the plaintiff's contentions, and has found that the plaintiff's testimony upon this matter is not to be believed. It is clear that the questions raised under this head are merely questions of fact.

"Second, The question of the proper construction of the written agreements.

"All questions of construction are saved by the master's report.

"Third, The question when the plaintiff left the employ of Adams, Taylor and Company.

"This question is important on two grounds. It fixes the time when he had the right to demand the repurchase of his shares, and it fixes the term of his employment. May 16, 1901, the plaintiff wrote a letter to Breck, executor of Adams, saying that he had 'this day left the employ of Adams, Taylor and Company,' and demanding that Breck repurchase the shares according to the terms of the written agreements. Under these agreements Taber had the right to leave at any time, and the master was clearly justified in finding that for the purpose of fixing his rights under those agreements and the time when the value of his shares should be determined Taber had left the employ of Adams, Taylor and Company on May 16, 1901.

"The master finds, however, that 'Taber remained at the office of Adams, Taylor and Company, notwithstanding his letter of May 16, 1901, until he finally left March 27, 1903, and acting with Barney carried on the business of the company down to the time when Breck was elected as principal trustee.'

"If this is so it is difficult to see why Taber is not entitled in his suit against the firm to some compensation for those services.

"It appears also, and is agreed, that certain items which appear in the accounts stated by the master as charged to Breck, as executor of Adams, should more properly be charged against the firm of Adams, Taylor and Company. These are the claims of 'salary' and 'balance appearing on books to the credit of Taber.' As the plaintiff insists upon this correction the report should be recommitted in order that the master may make the necessary correction. The report accordingly is to be recom-

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mitted to the master for these purposes only: to report the fair value of the services of Taber to Adams, Taylor and Company between May 16, 1901, and March 27, 1903; and whether there was any express or implied agreement between the parties as to compensation for the services so rendered; and to correct the accounts as stated by the master by charging the items of 'salary' and 'balance appearing on the books to the credit of Taber' to the firm of Adams, Taylor and Company in suit 1349, with leave to reopen the case for additional testimony or not, in his discretion, upon the matters above stated.

"As to all other matters the plaintiff's motion is denied."

The judge made an interlocutory decree in accordance with this memorandum of decision; and the plaintiff appealed.

Under the interlocutory decree the master made a supplementary report including the following findings:

"I find that the fair value of Taber's services from May 16, 1901, to March 27, 1903, was $7,500. If, in view of all the findings in my original report, he is entitled to recover anything for services during this period, he would be entitled to recover from Adams, Taylor and Company, $7,500 with interest to be computed at six per centum from March 27, 1903.

"I find that there was no agreement between the parties as to compensation for services rendered during the period in question."

He found also that the plaintiff was entitled to recover from the defendant Breck as executor, after deducting the amount of the plaintiff's note with interest, the sum of $46,015.74, and was entitled to recover from the firm of Adams, Taylor and Company the amount of $11,403.83. He also made an alternative finding under which the plaintiff would be entitled to recover from the defendant Breck as executor, after deducting the amount of the plaintiff's note with interest, the sum of $61,683.12 and from the firm of Adams, Taylor and Company the sum of $15,723.23.

The plaintiff made a motion before the master to reopen the case for additional testimony. The master denied the motion.

The plaintiff filed exceptions to the master's supplementary report, and thereafter the case was heard by *Richardson*, J. He made a decree overruling the exceptions to the master's report

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and to his supplementary report and confirming both reports. The plaintiff appealed.

Later that judge made final decrees as follows:

In the first suit (No. 1312), that the agreements dated December 31, 1897, February 1, 1899, and January 1, 1900, be specifically performed and carried into execution, as of May 16, 1901 (and for ease in computation May 31, 1901), and that the defendant Charles H. Breck, as executor of the will of Luther Adams, deliver to the plaintiff as satisfied and paid in full, the promissory note dated January 1, 1900, in the amount of $20,000, bearing interest at the rate of five per cent per annum made by the plaintiff to the order of Adams; and that said defendant pay to the plaintiff the sum of $46,370.80 and interest thereon from February 1, 1906, also with interest from May 31, 1901, to February 1, 1906, and that upon payment of this sum the plaintiff transfer by proper instrument of transfer and deliver to the defendant Breck, as executor, the shares specified in the agreements; and that the plaintiff recover against the defendant Breck and the defendant Barney his costs of suit taxed in the sum of $29.83.

In the second suit (No. 1349), that the defendants, Breck, as executor of the will of Luther Adams, and Mary A. Barney, as executrix of the will of Clarence A. Barney, as copartners doing business under the firm name of Adams, Taylor and Company, pay to the plaintiff or his legal representatives $11,522.45, founded upon the master's findings of May 16, 1901, with interest thereon to February 1, 1906, and additional interest from February 1, 1906.

The plaintiff appealed from both decrees.

J. C. Ivy, (*C. S. Ensign, Jr.* with him,) for the plaintiff.

J. Lowell & J. A. Lowell, for the defendants.

BRALEY, J. These cases were referred to a master under decretal orders which did not require a report of the evidence, but only such facts and questions of law as either party might request. Under this form of reference he declined to report the testimony in detail, and as the report is full and sets forth the facts on which his rulings of law were based, he was not obliged to submit the evidence on which these conclusions were reached. *Parker* v. *Nickerson*, 137 Mass. 487, 493. *Sawyer* v. *Common-*

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wealth, 185 Mass. 356, 359. In all the plaintiff alleged one hundred and twenty-one exceptions to the original and supplementary reports, and, although his brief presents many of them in groups and others by single instances, yet generally they may be correctly classified as relating either to the rights of the parties under the agreements and the declaration of trust as modified, or to adverse findings of fact made upon conflicting evidence. Upon a full consideration of these exceptions no reversible error is found except in one particular, to which full reference later will be made.

The partnership, of which the plaintiff and the decedents comprised all of the members, was a joint stock enterprise with transferable shares, organized under a declaration of trust. Originally it was provided that the death of a member should not work a dissolution of the firm, but that those who then became lawfully entitled as owners should succeed to all the rights in the certificate held by the deceased member. At the expiration by limitation of the first partnership it was extended for a further period, which had not expired at the time of the testator's death. This agreement of extension or renewal essentially modified the declaration of trust by providing that upon the death of either of the trustees, who then were Adams and Barney, at the election of any stockholder the partnership should be terminated and the assets distributed among the beneficiaries in proportion to their holdings. If the form of the association was intended to give to the partnership the attributes of a corporation without taking organized corporate form, while the liability to creditors for partnership debts would not be changed, as between themselves any right to contribution would be ascertained according to the shares held by each, and upon death distributees or legatees would succeed to the title and interest of the deceased partner in such share or shares, the value of which might be ascertained by an appraisal, but there would be no division or distribution of the assets as such, for the firm would continue as before. *Tyrrell* v. *Washburn*, 6 Allen, 466. *Gleason* v. *McKay*, 134 Mass. 419, 425. *Phillips* v. *Blatchford*, 137 Mass. 510, 515. *Breck* v. *Barney*, 183 Mass. 133. 2 Lindl. Part. (2d Am. ed.) 762. A bill in equity, however, would lie by the plaintiff if necessary to compel an accounting and the

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payment of dividends, if the trustee in the exercise of a sound discretion had refused or failed to divide accrued net profits. *Phillips* v. *Blatchford*, *ubi supra*. *Howe* v. *Morse*, 174 Mass. 491.

Whatever the plaintiff's rights as a partner may have been on the death of Adams to demand an adjustment on the basis of a dissolution and final distribution according to the proprietary interest of the members, he has not chosen to exercise this option, but seeks by the first bill specific performance of the several contracts, and by the second that an account of profits may be taken for the purpose of establishing the value of his services, which he alleges were rendered, not only under the written agreements, but also under certain additional oral contracts made with Adams, and after his death with Barney, who, as associate trustee, had succeeded to the authority of the principal trustee with a corresponding right to make such contracts in behalf of the firm. The evidence on the question not being reported, the master's finding that none of these oral contracts were proved is final. *Freeland* v. *Wright*, 154 Mass. 492. *Joslin* v. *Goddard*, 187 Mass. 165. In the beginning the defendant Breck's testator, Adams, was the owner of a controlling interest in the company and so continued until his death, when out of the entire capital of three thousand shares he possessed seventeen hundred and fifty, and of the remaining twelve hundred and fifty the plaintiff owned five hundred shares, while Barney, the third partner, held seven hundred and fifty shares. *Breck* v. *Barney*, *ubi supra*. This preponderating interest permitted him as principal trustee under the terms of the trust substantially to manage the affairs of the company as he deemed expedient, and all of the stock owned by the plaintiff had been sold to him from time to time by Adams according to the terms of the agreements.

The plaintiff's right to specific performance and to an accounting is thus left on these agreements, and the first question of importance is, when within the meaning of the contracts did he leave the employment of the firm, as that date determines the time when his shares were to be valued and his right to salary ended. Each contract contains a clause that the plaintiff should be considered as the absolute owner "subject only,

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as between the parties hereto, to the agreements hereinafter mentioned." An important fact to be remembered is that they are not executed by the company, but only by Adams, whose obligation to repurchase the shares was his personal undertaking. For the purposes of determining the excess in price beyond the par value, a full examination of the books of the partnership was required, as well as for the purpose of ascertaining the amount of unpaid dividends or dividends which had accrued but had not been declared, and a possible embarassment is removed by the master's finding that the surplus shown by the partnership books is to be treated as "dividends accrued but not declared," from which it follows that the shares never have exceeded in value for each year the maximum price at which they were to be repurchased. In his bill for specific performance the plaintiff alleges that he left the employment of the firm "after January 1, 1901," without naming any definite time, but the master finds that on May 16, 1901, in compliance with the agreements he gave a notice in writing to the executor that as this employment had ceased he was ready to transfer the shares, and demanded a settlement. While it is manifest from the report that the plaintiff in fact continued at the company's place of business acting with Barney in the management of its mercantile affairs until he was discharged the last of March, 1903, by the executor who had been elected principal trustee, and that on the twenty-seventh of that month he again demanded a settlement and repurchase of the shares, yet the master's finding, that the plaintiff's presence after May 16 was not as an employee, but as a member of the firm, and that he actually ceased to be employed by the company after the first date, is not reviewable as the evidence has not been reported. *East Tennessee Land Co.* v. *Leeson*, 183 Mass. 37, 38. *Crane* v. *Brooks*, 189 Mass. 228. *O'Brien* v. *Murphy*, 189 Mass. 353. Apart from this finding, however, the plaintiff is not shown to have acted under any mistake of fact, as the correspondence and negotiations between him and the executor make it plain that having taken this position he did not withdraw his demand or suggest any other date of adjustment as being either preferable, or more equitable. The executor at the plaintiff's request having treated the date selected as the time when performance was

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enforceable proceeded to arrange for a settlement by a sale of the company's property, and to permit the plaintiff subsequently to shift his position by moving forward the date for an accounting which might result in an additional payment to him therefore would be inequitable and unjust. *Raphael* v. *Reinstein*, 154 Mass. 178, 179. See *Miller* v. *Hyde*, 161 Mass. 472, 482, and cases cited.

If this date is accepted as the time of adjustment, the amount to be paid is to be determined by the fourth clause of each agreement.* These clauses, except as to dates, in this particular are synonymous, and by their terms to the par value of the shares is to be added the plaintiff's one sixth part of the net profits, which may be represented by surplus assets considered as dividends accrued but not declared. This method was adopted by the master, who took the financial standing of the company as shown by its books upon the date named by the plaintiff as the true criterion for the ascertainment of assets in whatever form they appeared. Instead of ascertaining the net assets by charging off uncollectible debts carried on the books at their face value, but which if taken at their actual value would have left little above the par value of the shares, he allowed the plaintiff the full amount, and there is no sufficient reason shown

* In the agreement of December 31, 1897, the fourth clause or paragraph was as follows:

"Fourth. Whenever, after one year from date, said Taber shall leave said employ, he agrees for himself and his legal representatives to sell and convey to said Adams, or his legal representatives, and said Adams, for himself and his legal representatives, agrees to purchase said shares of stock at the price of one hundred dollars per share and in addition thereto the value of such shares in excess of one hundred dollars per share, as shown by the books of said company, but the value of said shares in excess of one hundred dollars per share shall not exceed the rate of ten dollars per share per year, and the value of said shares as shown by the books of said company shall be deemed and taken to be one hundred dollars per share on January 1st, 1899, and all unpaid dividends, or dividends accrued but not declared, shall also be paid to said Taber, said sale to be for cash."

In the contract of February 1, 1899, the fourth clause or paragraph was in substantially the same language, with unimportant differences in punctuation, except that the date "January 1st, 1899," on which the value of the shares was to be taken to be one hundred dollars per share was changed to "January 1, 1900."

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in the numerous exceptions to this part of the report why the result reached, and which was sufficiently favorable to the plaintiff, should be modified or reversed.

The plaintiff's exceptions so far as they are found to relate to the second case rest on a misconception by the plaintiff of the nature of his remedy. Having made an election for specific performance without a dissolution of the firm, he cannot treat the partnership as dissolved and demand an accounting on that basis, for the company continued under the declaration of trust unaffected by the modification though one member had died, and when the plaintiff sold his shares he sold his interest in the property, however designated, and the purchaser thereby became entitled to what he had purchased. Between the parties this transfer became absolutely effective May 16, 1901, and thereafter the shares and profits by way of undeclared dividends attaching to them became vested in the executor, who stood in the testator's place. *Phillips* v. *Blatchford*, *ubi supra*. See *Kingman* v. *Spurr*, 7 Pick. 235. What the plaintiff in effect attempted to maintain before the master, and now endeavors to maintain under his exceptions, is, that for the purpose of enforcing the agreements the partnership is a joint stock company, and when a member has been paid for his shares, which carry with them accrued but undeclared dividends, they belong to the transferee, but that after such a sale and transfer has been made the former shareholder can maintain a bill in equity against the partnership, which then includes the new member, for an accounting of these profits. The answer is obvious: the plaintiff is no longer a member of the firm, having unreservedly parted with all his title and interest in the company when he sold his shares with their accumulations.

If the principal object for which the bill was brought failed when the master found that the alleged oral contracts were not proved, or that it could not be maintained for a partnership accounting except to recover arrears of salary and dividends declared and placed to his credit but not paid, further relief may be granted for the purpose of compensating the plaintiff for any service he may have rendered and for which the partnership was liable. It is undisputed that he did not actually sever his connection with the business management of the com-

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pany until he was discharged on March 27, 1903, and the master in his supplementary report finds that during the period from May 16, 1901, to this date, his services were beneficial, and estimates their value at $7,500, and the evidence on this issue not being reported this finding is conclusive. But as the plaintiff's connection with the company had not been discontinued while the negotiations were in progress there would seem to be no sufficient reason why independently of the agreements he is not entitled to reasonable remuneration in some form, although disallowed by the master, especially as his services which were valuable were performed with the knowledge and without any dissent by the executor, and with the knowledge and assent of the associate trustee, who during the time properly represented the company. See *Schenkl* v. *Dana*, 118 Mass. 236; *Jepson* v. *Killian*, 151 Mass. 593; *Fitzgerald* v. *Allen*, 128 Mass. 232, 234.

The motion of the plaintiff at the hearing before the master under the order of recommittal that the whole case be reopened for the introduction of further evidence under the second bill was irregular as it should have been addressed to the court, and his refusal to grant this request is not a matter of exception. 2 Dan. Ch. Pl. & Pr. (5th ed.) 1221, note 2. And as all the remaining exceptions to the supplementary report of the master depend upon a different view of the testimony than that taken by him they must be overruled.

The thirty-sixth exception to the original report, that the "account and findings, and several items therein, are less than is required by law, equity, the evidence, and weight of the evidence" therefore must be sustained. For the purpose of allowing the sum named above the final decree under the second bill must be reversed so that the account may be reformed by the addition of $7,500 with interest, but the final decree under the first bill is affirmed for reasons already stated. Appeals also having been taken from the interlocutory decrees it is enough to say that the first decree granting a limited recommittal protected the plaintiff's rights at the only point where the master is found to have erred, while the second decree overruling his exceptions under the first bill and confirming the report should be affirmed as no error is shown, although upon the second bill the decree

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must be modified to the extent of allowing the exception to the refusal to award reasonable compensation for the period named.

Ordered accordingly.

JOHN C. GRAY & others, trustees, *vs.* JOHN M. WHITTEMORE & others.

Suffolk. March 26, 1906. — June 20, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, BRALEY, & SHELDON, JJ.

Devise and Legacy. Perpetuities. Dower. Trust, Equitable conversion. *Husband and Wife. Words,* "Heirs," "Heirs at law."

If by the terms of a devise or legacy the estate or interest created must begin within the time prescribed by the rule against perpetuities it is not made invalid by the fact that it may extend beyond that period. Thus life estates given to the husbands and wives of the testator's children who respectively may survive them are valid; and so is a limitation to the issue of such of the testator's children as shall die leaving no husband or wife.

If a will provides that after life estates in the children of the testator the remainders shall go for life to any surviving husband or wife of a child of the testator and after the death of such husband or wife shall then and not before vest in the issue of such child of the testator or in default of such issue in his heirs, and also provides that upon the death of any of the testator's children without leaving a surviving husband or wife the remainder shall go to the issue of such child, this last named remainder is valid without regard to the question whether the remainder after the death of a surviving husband or wife is void under the rule against perpetuities, because the two remainders are limited upon wholly distinct and separate events, either of which, if it occurs, will exclude the existence of the other.

Semble, that a remainder which is intended by a testator to vest after a life estate in one of his children followed by a life estate in the surviving husband or wife of such child would be void under the rule against perpetuities, because the child in question might marry a person not in being at the time of the death of the testator and such person might be the survivor of the marriage and might not die until after the expiration of twenty-one years from the death of the testator's child.

A testator by his will gave a life estate to his wife with remainders to his children for life, and then in substance directed his trustees upon the death of any of his sons to pay such son's share of income to his widow, if any, during her widowhood; upon the death of any of his daughters to pay her share of income to her surviving husband, if any, for life; and upon the death of any of his children leaving no surviving widow or husband, or upon the death of any surviving husband or the death or marriage of any such widow, to pay or transfer a proportional share of the principal sum to the issue, if any, of his deceased son

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or daughter, and in the case of default of such issue at the time of such decease or marriage to pay or transfer such share to the heirs at law of such deceased son or daughter. *Held*, that the words "in the case of default of such issue at the time of such decease or marriage" referred, not only to the death of a child unmarried or of a surviving husband or to the death or remarriage of a surviving wife, but also to the death of any child of the testator whether or not leaving a surviving husband or wife; that in case of those children of the testator who died leaving a husband or wife but no issue, the remainders in the heirs at law of the testator's children vested upon the respective deaths of those children, their enjoyment being postponed until the death of the surviving husband or the death or remarriage of the surviving wife; and that, in case of those children of the testator who died leaving issue and also a surviving husband or wife, the remainders in the issue vested either at the death of the testator or at the time of the death of each child, the right of present possession being postponed until the expiration of the intervening life estate, it being immaterial to determine whether the further remainders to the heirs at law of these children upon a failure of issue vested at either of those times or whether they were void under the rule against perpetuities.

In construing a provision in a will this court will adopt a construction which is effectual to accomplish the object which the testator had in view rather than one which will defeat his purpose by creating a perpetuity which the law will not sustain.

A widow is not entitled to dower in a vested remainder.

The heirs at law of a child of a testator, to whom the testator has made a devise in case of default of issue of such child at the time of such child's death, necessarily are to be determined at the time of the death of the child in question.

Where real and personal property are included in a single provision of a will by which the income is to be paid to beneficiaries for life and at the expiration of the life interests the trustees are to pay and transfer the whole property to the "heirs at law" of a certain person, if there is nothing in the will to show that the testator intended otherwise, the whole property will go to those who would inherit the real estate of the person in question.

The right of a surviving husband under Pub. Sts. c. 124, § 1, to the real estate of his wife in fee to the amount of $5,000 in case of her death without issue entitles him in this event to share to this amount in a devise to the heirs at law of his wife, unless a contrary intent is shown by the will, and the fact that the devise to the heirs at law of the wife is preceded by a life interest in the husband himself does not indicate such contrary intent.

A testator by his will gave a life estate to his wife with remainders to his children for life, and then in substance directed his trustees upon the death of any of his sons to pay such son's share of income to his widow, if any, during her widowhood; upon the death of any of his daughters to pay her share of income to her surviving husband, if any, for life; and upon the death of any of his children leaving no surviving widow or husband, or the death of any surviving husband or the death or marriage of any such widow, to pay or transfer a proportional share of the principal sum to the issue, if any, of his deceased son or daughter, and in the case of default of such issue at the time of such decease or marriage to pay or transfer such share to the heirs at law of such deceased son or daughter. *Held*, that surviving husbands of the testator's daughters who had died without issue, under Pub. Sts. c. 124, § 1, which was in force at the times of the deaths of their respective wives, were entitled to share each to the amount of $5,000 in

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the remainders to the "heirs at law" of their wives, the enjoyment of which was postponed until the termination of their own life interests.

Where a will does not direct that the real estate of the testator shall be converted into personal property but gives to the trustees thereunder power to sell and convey the trust property and to make new investments, a fund resulting from a sale of real estate retains its original character until it reaches one who has the right to treat it as his own absolutely and for all purposes.

BILL IN EQUITY, filed in the Supreme Judicial Court on March 29 and amended on October 10, 1905, by the trustees under the will of Thomas Whittemore for instructions as to the distribution of the property held by them under the residuary clause of that will which is described and quoted in the opinion.

The case was heard by *Braley*, J., who found certain facts which appear in substance in the opinion and reported the case for determination by the full court, such decree to be entered as justice and equity might require.

Roland Gray, for the trustees.

E. M. Brooks, for Josephine P. Thwing.

J. P. Richardson & W. W. Hart, for Malcolm McLoud.

J. G. Palfrey, for George L. Whittemore.

C. A. Whittemore, for George P. Gifford and others.

R. F. Sturgis, for Marion St. C. Whittemore and Charles S. Clark, her guardian.

C. S. Ward, for Anna E. Bowman.

F. W. Knowlton, for Thomas Whittemore.

SHELDON, J. Thomas Whittemore died on March 21, 1861, leaving a will, by the fifth clause of which he bequeathed all the residue of his estate to trustees in trust to pay the net income thereof to such of his children as should survive him, during their lives; and also upon the death of any of his sons "to pay to the widow or widows of such son or sons, if any, the respective shares of income which would have been paid to the deceased husband or husbands, if living; to wit, so long as she or they shall remain the widow or widows of such deceased: and upon the death of any of my daughters who shall survive me, to pay to the surviving husband or husbands of such deceased, if any, the respective shares of income which would have been paid to the deceased wife or wives if living: to wit, during the natural life or lives of such husband or husbands: and upon the

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death of any of my sons leaving no widow, or of any of my daughters leaving no husband or of any husband of any of my daughters, who shall survive such daughter, and upon the death or marriage of any widow of any of my sons, such share of the principal sum and estate so held in trust, as shall be proportional to the income that would have been paid to such deceased son, daughter, daughter's husband or son's widow shall be paid or transferred to the issue if any of such deceased son or daughter: and in default of such issue at the time of such decease or marriage, the same shall be paid or transferred to the respective heirs at law of such my deceased son or daughter: and this provision shall take effect, both in the case of such issue, and in the case of default of such issue at the time of such decease or marriage, whether such decease or marriage take place after my own death or before: . . . And I hereby empower my said trustees and their successors, to sell and convey any or all of said trust property: discharged of the trusts, and without obligation upon the purchasers to see to the application of the purchase money: and the proceeds shall be held upon the same trusts."

The testator left surviving him a widow, who has since died, and eight children: John M. Whittemore, Thomas Whittemore, Benjamin B. Whittemore, Abby E. Ruggles, Lydia A. Lucas, Joseph Whittemore, Lovice C. Cowles, and Eliza A. Gifford. All these children have now died, the first named in November, 1861, and the others at various dates since that time, some leaving only a widow or husband, some leaving only issue, and some leaving both issue and a widow or husband. The trustees have distributed according to the terms of the will four of the eight shares which made up the trust fund, being the shares which became divisible by the death of the children and their surviving husbands or wives before 1904; one share is still held for the benefit of the widow of a son of the testator for her life or widowhood; all the life interests in the other three shares of the trust fund created by the will have now come to an end; and the plaintiffs, who are the present trustees under the will, ask that they may be instructed to what persons and in what proportions they should distribute these three shares.

The defendants Josephine P. Thwing and McLoud contend

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that the remainders which are attempted to be created by the residuary clause of the will in question are all invalid on the ground of remoteness under the rule against perpetuities, and especially that the gifts over upon the death or remarriage of the surviving husbands or wives of the testator's children are so invalid, both in the event of there being issue of the children surviving at the time of such death or remarriage and in the event of there being no issue surviving at that time, and that the residue of the testator's estate must now, after the death of all his children, be taken to be undisposed of by his will, and must go to the persons who now represent those who were his heirs at law or next of kin at the time of his death. Mrs. Thwing also contends that she is in no way precluded from asserting her full rights by the distributions that have been made of the four shares of which the income was payable to John M. and Thomas Whittemore and Mrs. Ruggles and Mrs. Gifford, or by the allowance of the trustees' accounts which showed such distributions. She contends that she is entitled to a common law dower interest in her husband's share of this residue, so far as it consisted of real estate, and to the personal property, to the amount of $5,000 and to one half of the excess above $10,000. She also claims that if the whole will is valid, she was yet one of the heirs at law of her deceased husband, John M. Whittemore, a son of the testator; that on her remarriage one eighth of the residuary principal was payable to his heirs, and that of this one eighth share she was entitled to have her dower in the real estate, and her distributive share in the personalty. The defendants Wellington and McLoud contend that past distributions, whether erroneous or not, cannot now be inquired into or taken into account, and that their intestates Lucas and Cowles are entitled each to the share of his deceased wife either as her devisee and legatee or as her statutory heir and next of kin, whether the limitations made by the residuary clause of the will in question were valid or invalid. The defendant Wellington also contends that if these limitations were valid Cowles was entitled in the right of his deceased wife to participate in the distribution of the shares of which Mrs. Lucas had received the income, when the right to this distribution accrued on the death of Mrs. Lucas in 1904. In the event of some of these contentions

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being sustained, it will also be material to determine whether the fund in the hands of the trustees is to be regarded wholly as personal estate, or whether that part of the fund which consists of the proceeds of real estate sold on or before April, 1898, is still to be treated as real estate.

We see no ground for the contention that the limitations in remainder immediately after the life estates given to the testator's children are too remote. Of necessity the children of the testator who survived him must all be in existence at the time of his death; and their life estates must all expire within the limit of lives then in being. It is settled that an interest is not obnoxious to the rule against perpetuities if it begins within the prescribed period, although it may extend beyond that limit. Gray, Rule against Perpetuities, (2d ed.) § 232, and cases there cited. The life estates given to the surviving husbands or wives of the testator's children are therefore valid. And we are of opinion that the limitation of the principal sum of a share to the issue of his children who should die leaving no husband or wife is also valid. The remainder to the issue of his children is given upon two alternatives, first upon the death of his children respectively without leaving any surviving husband or wife, and secondly upon the death of any surviving husband or the death or remarriage of any surviving widow. If we assume for the sake of the argument that the remainder limited upon the latter event is to go only to the issue in existence at that later time, is merely contingent and comes (as in that case it might come) within the rule against perpetuities, yet the remainder limited upon the former event, a wholly distinct and separate event, would be valid. Gray, Rule against Perpetuities, §§ 341 *et seq.* *Stone* v. *Bradlee*, 183 Mass. 165. *Seaver* v. *Fitzgerald*, 141 Mass. 401. *Jackson* v. *Phillips*, 14 Allen, 539, 572. This is not the case of a limitation expressed to be made upon one double contingency or upon the happening of two events which the testator has not separated, but one in which the testator has himself made the distinction and separation between the two different events, either one of which, if it occurs, will exclude the existence of the other. *Miles* v. *Harford*, 12 Ch. D. 691. *Monypenny* v. *Dering*, 2 DeG., M. & G. 145. *Leake* v. *Robinson*, 2 Meriv. 363. It is true, no doubt, that where the testator has made only one contingency, though

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depending upon a twofold event, the courts will not split this up into two contingencies, one good and one bad, and sustain the limitation on the ground that only the good contingency has taken place. *Proctor* v. *Bishop of Bath*, 2 H. Bl. 358. *In re Harvey*, 39 Ch. D. 289. *Hancock* v. *Austin*, [1902] A. C. 14. But this is not such a case. And see the decisions cited in 22 Am. & Eng. Encyc. of Law, (2d ed.) 708. However it may be, therefore, in the cases of other children, we are clearly of opinion that the limitation to the issue of those of the testator's children who should die without leaving a husband or wife surviving her or him was valid. It follows accordingly that the limitations to the issue of Thomas Whittemore and of Eliza A. Gifford were valid, and the distributions of the shares of the trust fund of which they had respectively received the income were properly made by the trustees to their issue in accordance with the terms of the will.

But it is contended that the life estates given to the surviving husbands or wives of the testator's children might go beyond the measure established by the rule against perpetuities, of a life or lives in being and twenty-one years thereafter; for one of his children might marry a person not in being at the time of his decease, and such person might be the survivor of the marriage; so that remainders which could take effect only upon the death or remarriage of any such surviving husbands or wives might not become vested within the necessary period. *Sears* v. *Russell*, 8 Gray, 86. *Lett* v. *Randall*, 3 Sm. & G. 83. *Goodier* v. *Johnson*, 18 Ch. D. 441. Undoubtedly this is true. And, as was said in the leading case of *Brattle Square Church* v. *Grant*, 3 Gray, 142, 152, 153, quoted and followed in *Sears* v. *Putnam*, 102 Mass. 5, 7, "in order to test the legality of a limitation, it is not sufficient that it be capable of taking effect within the prescribed period; it must be so framed as *ex necessitate* to take effect, if at all, within that time." As has been stated, a remainder that could not become vested until the death or remarriage of the surviving husbands or wives of the testator's children might by possibility not take effect until after the expiration of the prescribed period, and so could not be sustained. Gray, Rule against Perpetuities, (2d ed.) § 214, and cases there cited. Remainders, however, that should appear to be so limited

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as necessarily to vest in interest within the period limited by the rule would be valid, even though the actual payment and transfer to the beneficiary, the right to actual possession and enjoyment, might be postponed to a later period. *Stone* v. *Forbes*, 189 Mass. 163, 172. *Loring* v. *Blake*, 98 Mass. 253, 259. *In re Appleby*, [1903] 1 Ch. 565. *Christie* v. *Gosling*, L. R. 1 H. L. 279. *Wainwright* v. *Miller*, [1897] 2 Ch. 255. *In re Roberts*, 19 Ch. D. 520. Accordingly it becomes material to determine whether the interests here given in remainder were vested or contingent.

This question must be settled upon the fair construction of the language used by the testator, so as to ascertain and carry out the intent shown by the words he has used. *Crapo* v. *Price*, 190 Mass. 317. *Pearks* v. *Moseley*, 5 App. Cas. 714, 719. That language has already been quoted and need not be repeated. It is in substance a direction to his trustees upon the death of any of his sons to pay his (the son's) share of income to his widow, if any, during her widowhood; and upon the death of any of his daughters, to pay her share of income to her surviving husband, if any, for life; and upon the death of any of his children leaving no surviving widow or husband, or the death of any surviving husband or the death or marriage of any such widow, to pay or transfer a proportional share of the principal sum to the issue, if any, of his deceased son or daughter, and in the case of default of such issue at the time of such decease or marriage, to pay or transfer such share to the heirs at law of such deceased son or daughter.

It has been argued that the words "in the case of default of such issue at the time of such decease or marriage" can refer only to the death of a child unmarried or of a surviving husband or the death or remarriage of a surviving wife; but we are of opinion that these words have a somewhat broader signification and must be taken to refer also to the death of a child of the testator whether or not leaving a surviving husband or wife. It follows accordingly that the final limitation to the heirs at law of the respective children of the testator is also made to depend upon either one of two separate and distinct events, first, the failure of issue at the death of the child himself, and secondly, the failure of issue at the death or marriage of the

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child's surviving husband or wife. That is, this part of the will must be read as if the words used had been, "and in default of such issue at the time of the decease of my sons or daughters respectively, or of the decease of the surviving husband of any of my daughters, or of the decease or marriage of the widow of any of my sons, the same [share of the trust fund] shall be paid or transferred to the respective heirs at law of such my deceased son or daughter." Manifestly this is a limitation upon the happening of either one of the alternative events, which have been separated and distinguished by the testator himself. See the cases cited *supra*. The first of these events must happen, if at all, within the necessary limit of time; and it actually has so happened in the cases of John M. Whittemore, a son, and Mrs. Lucas and Mrs. Cowles, daughters of the testator, each one of whom has died, leaving respectively a wife or a husband, but no issue. In each of these cases, we are of opinion that the limitation to the heirs at law of the deceased child took effect and became vested upon the decease of that child, though subject in each case to be postponed as to actual possession and enjoyment until the termination by death or marriage of the life estate given to the surviving husband or wife. The doctrine was declared in this Commonwealth in *Loring* v. *Blake*, 98 Mass. 253. In the case of John M. Whittemore, the life estate of his widow came to an end in 1863 by her remarriage; in the cases of Mrs. Lucas and Mrs. Cowles, they came to an end respectively in 1904 and 1905, by the deaths of Edmund G. Lucas and John E. Cowles. Accordingly, the share of which John M. Whittemore, and after his death until her remarriage, Josephine P. Thwing received the income was properly distributed by the then trustees to his heirs at law in accordance with the directions of the will; and the shares of which Mrs. Cowles and after her death John E. Cowles, and of Mrs. Lucas and after her death Edmund G. Lucas, received the income should now be distributed among the heirs at law of Mrs. Lucas and Mrs. Cowles respectively.

Three of the testator's children, Benjamin B. Whittemore, Joseph Whittemore and Mrs. Ruggles, died, each leaving issue and also a surviving wife or husband. In each of these cases it remains to be determined whether the issue took at or before the death of their parent vested interests in proportionate shares of

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the fund, or whether their remainders were contingent only, and could not become vested until the subsequent death of the surviving husband or wife of their respective parents. If the remainders to the issue of these three children were vested before the death of their parent, or even if before that time they were contingent merely, but became vested upon the deaths of their respective parents, then it is evident, both as a matter of sound reason and upon the authorities heretofore cited, that their interests not only did in fact vest, but of necessity must vest, before the period fixed by the rule against perpetuities, i. e. a life or lives in being and twenty-one years thereafter, could expire. In that event, it would not be necessary to determine whether the further limitation to the heirs at law of these children upon a failure of issue at the subsequent death or marriage of their surviving husbands or wives could take effect otherwise than by way of executory devise divesting the absolute interests that would already have become vested in such issue in favor of the heirs at law of their ancestor, and whether it would not thus be obnoxious to the rule against perpetuities and would have to be treated as void, or whether it could be maintained as a remainder vesting either at the death of the testator or at the respective deaths of these children. See as to this, besides other cases cited herein, *Loring* v. *Blake*, *ubi supra*; *Dove* v. *Torr*, 128 Mass. 38; *In re Hancock*, [1901] 1 Ch. 482. If the final limitation is valid, then *a fortiori* that which we are now considering must be sustained. If it is invalid, yet the rule is settled that an absolute bequest which once has vested in interest in the beneficiary will not be divested for the benefit of the testator's heirs at law merely because a subsequent limitation, which is intended to take effect either as an executory devise or by reducing in the contingency named the absolute interest previously given to a base fee, must fail of effect. *Goodier* v. *Johnson*, 18 Ch. D. 441. As was said in *Lovering* v. *Worthington*, 106 Mass. 86, 88, "the general rule is, that, if a limitation over is void for remoteness, it places all prior gifts in the same situation as if the devise over had been wholly omitted. If the prior gift was in fee, the estate is vested in the first taker discharged of the limitation over; if for life, it takes effect as a life estate." *Sears* v. *Putnam*, 102 Mass. 5. In the case at bar, the gift to the issue of these children, if

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a vested interest, is absolute, or in fee. If the final limitation over to the children's heirs at law was valid, yet it has not taken effect, for there was no failure of issue on the death of the surviving husband or wife; if the final limitation is invalid, it is simply to be disregarded, and the issue retain the absolute estate which has once vested in them. *Brattle Square Church* v. *Grant*, 3 Gray, 142, 156. Accordingly, if by the proper construction of the will the remainders to the issue of the three last mentioned children of the testator became vested interests either before or at the respective deaths of those children, then the further limitation to the heirs at law is simply to be disregarded, and the estates given to the issue remain absolute. Nor need we consider whether the issue of these children, each one of whom left a surviving husband or wife, took vested remainders before the deaths of their parents; for it is enough here if such remainders became vested at the time of such deaths. If Joseph Whittemore's son, John St. Clair Whittemore, who died before his father, had such a vested interest, then upon his death leaving a daughter, his interest passed to and became vested in her. *Lee* v. *Welch*, 163 Mass. 312. *Jackson* v. *Jackson*, 153 Mass. 374. *Hills* v. *Barnard*, 152 Mass. 67. *Hall* v. *Hall*, 140 Mass. 267. *Campbell* v. *Stokes*, 142 N. Y. 23. The issue take *per stirpes*. *Coates* v. *Burton*, 191 Mass. 180. *Daggett* v. *Slack*, 8 Met. 450.

Did then the issue of these children take vested remainders, at any rate upon the decease of their respective parents? It is a general rule of construction that when the language used by a testator is of doubtful import remainders will preferably be regarded as vested, unless a contrary intention is to be gathered from the provisions of the will. *Minot* v. *Purrington*, 190 Mass. 336. *Bosworth* v. *Stockbridge*, 189 Mass. 266, and cases there cited. *Knowlton* v. *Sanderson*, 141 Mass. 323. *Minot* v. *Harris*, 132 Mass. 528, 529. *Dingley* v. *Dingley*, 5 Mass. 535, 537. As was said by Knowlton, C. J. in *Bosworth* v. *Stockbridge*, *ubi supra*, "*Hale* v. *Hobson*, 167 Mass. 397, *Harding* v. *Harding*, 174 Mass. 268, and other cases relied upon by some of the respondents, are not departures from this rule; but they are cases in which the court found, in the will, evidence of a clear intention that the estate should not vest until the death of the life ten-

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ant." And it is to be observed that all the limitations here in question are to the direct descendants of the testator; a circumstance which has been deemed to warrant the inference that vested rather than contingent remainders were intended to be created. *Gibbens* v. *Gibbens*, 140 Mass. 102, 104. *Stanwood* v. *Stanwood*, 179 Mass. 223. *Bancroft* v. *Fitch*, 164 Mass. 401. The rule is the stronger when the remainders limited would be void for remoteness if held to be contingent. *Loring* v. *Blake*, 98 Mass. 253, 260. *Seaver* v. *Fitzgerald*, 141 Mass. 401. *In re Turney*, [1899] 2 Ch. 739, 747. *St. John* v. *Dann*, 66 Conn. 401. *Post* v. *Hover*, 33 N. Y. 593. *McBride's estate*, 152 Penn. St. 192. A somewhat strained construction has sometimes been adopted for this purpose. *Taylor* v. *Frobisher*, 5 DeG. & Sm. 191. *Berkeley* v. *Swinburne*, 16 Sim. 275. But apart from any such general rule of construction we think it manifest that the intention of this testator was that the issue of his children should take a fixed and vested interest, at least at the time of the decease of their respective parents. *Otis* v. *McLellan*, 13 Allen, 339. It was expressly held in that case upon a limitation to issue postponed in actual payment in substantially the same manner as in the case before us until the death of any surviving husband or wife, that the right of the issue vested in interest upon the death of the children of the testator, subject only to the life estate of any surviving husband or wife in the income. The mere fact that the actual payment and transfer to the issue is not to be made until the expiration of the previous life estate is not enough to control this intent. *Otis* v. *McLellan*, *ubi supra*. *Evans* v. *Walker*, 3 Ch. D. 211. *Wainwright* v. *Miller*, [1897] 2 Ch. 255. *Siddall's estate*, 180 Penn. St. 127.

Accordingly we are of opinion that the remainders severally limited to the issue of Benjamin B. Whittemore, Joseph Whittemore and Abby E. Ruggles vested in such issue at the decease of their parents, though the right of present possession was postponed in each case until the expiration of an intervening life estate. *Lombard* v. *Willis*, 147 Mass. 13. *Pike* v. *Stephenson*, 99 Mass. 188. *Bowditch* v. *Andrew*, 8 Allen, 339. Not only is this construction in accord with the manifest intent of the testator and effectual to accomplish the object which he had in

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view, but the opposite construction "would defeat that purpose, by creating a perpetuity which the law would not sustain. In such a case, the court is bound to adopt that construction which will sustain the will and effectuate the objects of the testator." *Loring* v. *Blake*, 98 Mass. 253, 260. *Galland* v. *Leonard*, 1 Swanst. 161. *O'Mahoney* v. *Burdett*, L. R. 7 H. L. 388. In the cases in which the life estate has now terminated, the plaintiffs are therefore to be instructed that distribution is to be made to the issue of the testator's children, if any.

It has been argued in behalf of Mrs. Thwing that the distributions which were made by the then trustees upon her remarriage and the deaths of Thomas Whittemore, Otis T. Ruggles and Eliza Gifford of the four shares to the income of which they had respectively been entitled were erroneously made; but it has been found by the single justice before whom this case was heard that these distributions were all made in accordance with the directions of the will. It results from what already has been said that these distributions were properly made. Mrs. Thwing could have had no dower or interest in the nature of dower in real estate of which her husband had in his lifetime no present estate of inheritance. "A widow is not entitled to dower in a vested remainder. *Eldredge* v. *Forrestal*, 7 Mass. 253. *Brooks* v. *Everett*, 13 Allen, 457." C. Allen, J. in *Watson* v. *Watson*, 150 Mass. 84, 85. She cannot as dowress be regarded as an heir of her husband. *Proctor* v. *Clark*, 154 Mass. 45, 50. Nor has she the rights of a distributee, under the limitations of this will. *Fabens* v. *Fabens*, 141 Mass. 395, 399. *Olney* v. *Lovering*, 167 Mass. 446. Her deceased husband of course could not be an heir at law of his brothers and sisters who survived him. Even if Mrs. Thwing's rights had been disregarded in these distributions, it would be at least difficult to say that any errors in them could now be corrected, after they have been allowed by decrees of the Probate Court, which are found to have been made after proper notice. See *Minot* v. *Purrington*, 190 Mass. 336, and cases there cited. Nor is it necessary to consider how far any of the parties objecting to these distributions, which appear to have been made respectively in 1863, 1872, 1877, and 1898, are barred by laches from now raising objections to them, after having acquiesced in them since the

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times stated. *Lindsey* v. *Fabens*, 189 Mass. 329. *In re Whittemore*, 157 Mass. 46. *Wagner* v. *Baird*, 7 How. 234.

It is necessary also to determine who are the persons entitled to take under the designation "heirs at law" of deceased children. In each of the cases in which such heirs take under the limitations of this will, they are necessarily to be determined at the death of the particular child in question. *Dove* v. *Torr*, 128 Mass. 38. *Proctor* v. *Clark*, 154 Mass. 45. *International Trust Co.* v. *Williams*, 183 Mass. 173. It is because the limitation in their favor must take effect at that time that its validity has been sustained in what has been said heretofore. And we think it manifest that by these words, in the connection in which they are used, the testator intended to designate those who under the law of this Commonwealth would inherit the real estate of the person whom they represent. This case comes under the rule of *Clarke* v. *Cordis*, 4 Allen, 466, and *Lombard* v. *Boyden*, 5 Allen, 249, in which it was held that where real and personal estate are included in a single provision, by which the income is to be paid to life tenants, and at the expiration of the life estates the trustees are to pay and transfer the whole property to the legal heirs either of the testator or of one of the life tenants, there being no indication that more than one class is intended or that the two kinds of property are to go in different directions, the whole property will go to those who are technically described as heirs. *Welch* v. *Brimmer*, 169 Mass. 204. *Olney* v. *Lovering*, 167 Mass. 446, 448. *Proctor* v. *Clark*, 154 Mass. 45. *Lincoln* v. *Perry*, 149 Mass. 368. *Fabens* v. *Fabens*, 141 Mass. 395. *Merrill* v. *Preston*, 135 Mass. 451. *Rand* v. *Sanger*, 115 Mass. 124, 128. *Holbrook* v. *Harrington*, 16 Gray, 102, 104. *Daggett* v. *Slack*, 8 Met. 450, 453. An apparently stronger statement of this doctrine in *Loring* v. *Thorndike*, 5 Allen, 257, turns upon the evident intention of the testator. In the cases in which, under somewhat similar circumstances, the word "heirs" has been construed to have other than its common law meaning, so as to include those who would take personal property, either alone or together with heirs strictly so called, it generally will be found either that the fund consisted wholly of personal property, or that any real estate included therein was directed by the testator to be converted into personal property, or that

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the decision turned upon what was found to be the particular intention of the testator. *Lawrence* v. *Crane*, 158 Mass. 392. *Kendall* v. *Gleason*, 152 Mass. 457. *White* v. *Stanfield*, 146 Mass. 424. *Sweet* v. *Dutton*, 109 Mass. 589. *Houghton* v. *Kendall*, 7 Allen, 72, 76. And in many of these cases the general rule which we have stated is fully recognized in the opinion of the court. See for example the language of Allen, J. in *Lawrence* v. *Crane*, *ubi supra*, at p. 393. This, in the contingency which has occurred, was a substantive gift to the heirs of these children of something which their parents were in no event to take; the circumstances are almost the same as those which existed in *Fabens* v. *Fabens*, *ubi supra*, and the principle laid down in that case must be followed here.

The shares now to be distributed are those of which the income was paid to Mrs. Lucas, Mrs. Cowles, and Joseph Whittemore. In each of these cases the income has until recently been paid to a surviving husband or wife; but these life estates have now ended. Joseph Whittemore left issue, and nothing need be added to what has been said concerning the distribution of that share. But Mrs. Lucas and Mrs. Cowles left no issue; and these shares are now to be paid and distributed to their heirs at law; and in each case the representative of her deceased husband claims to be entitled to a portion of the fund on the ground that he was a statutory heir of his deceased wife.

By the law of this Commonwealth, both in 1885 and in 1895, the respective times of the decease of Mrs. Lucas and Mrs. Cowles, a husband surviving his wife who left no issue took her real estate in fee to the amount of $5,000. Pub. Sts. c. 124, § 1. It has been held that this right is sufficient to entitle him, up to this amount, to property devised to his wife's heirs at law, unless a contrary intent is shown by the will. *Olney* v. *Lovering*, 167 Mass. 446. *Proctor* v. *Clark*, 154 Mass. 45, 49. *Lincoln* v. *Perry*, 149 Mass. 368. *Lavery* v. *Egan*, 143 Mass. 389. Nor is the mere fact that the surviving husband was given a life estate by the will sufficient to prevent him from taking also as one of the remaindermen. *Smith* v. *Smith*, 186 Mass. 138. *Cushman* v. *Arnold*, 185 Mass. 165. *Chesman* v. *Cummings*, 142 Mass. 65, 70. But this general rule cannot prevail against

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the plain intention of the testator as shown by the language of his will, and it has been argued that it does appear by this will that he did not intend the surviving husbands or wives of his children to take as their heirs at law. It is contended that the whole scheme of the will was to provide for the testator's direct descendants, by giving finally the share set apart for the benefit of each child to his issue, if any, and otherwise to the other descendants of the testator as the child's heirs at law; that it conclusively appears that he intended to give to their surviving husbands or wives merely a life estate; that he dealt alike with widow and surviving husbands, and that he could not have intended that a son's widow who should remarry and thereby terminate her life estate should at once become entitled to a large part of the fund at the expense of his own descendants. And it is urged that the same considerations apply with no less force to a construction which would divert, at any rate in part, the fund set aside for the heirs at law of his daughters to the estates of their deceased husbands who had happened to survive them, so that, after the decease of such husbands, his bounty would go to strangers in blood, perhaps not even known to him, although the only beneficiaries whom he had designated were the issue or heirs at law of his own children, whom he naturally would expect to be either his immediate descendants or near kinsmen. Accordingly it is contended that he intended to determine indeed the heirs at law of each child at the time of such child's decease, but to exclude any surviving husband or wife from that class, and to restrict any benefit which they were to take to the life estates which were expressly given to them. See *Pierce* v. *Knight*, 182 Mass. 72; *Heard* v. *Read*, 169 Mass. 216; *Welch* v. *Brimmer*, 169 Mass. 204, 211, 212, and cases there cited.

The question is not free from difficulty; but upon the language of this will the arguments which have been stated do not seem to us to be convincing. It does not appear that the general scheme of the testator was, in all the contingencies which he contemplated, to limit his bounty to his own descendants. He was content, upon the death of any of his children without issue, that the share apportioned for the benefit of such child should go, not to his own heirs at law, but to those of the child. He must have had in mind that those heirs were to be ascertained at the

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death of such child, and must have recognized the fact that it would be impossible to foretell who those heirs would be. Even under the limitation to the issue of his children it might well have happened that shortly after his own death one or more of the shares into which his residue was to be divided would have gone to entire strangers. If his son John had left issue, the remainder in one share would have vested in them, subject only to the life estate of their mother. If they had died before the remarriage of their mother, she would have been their heir under the statutes then in force. Gen. Sts. c. 91, § 1. In 1863, accordingly, if these not impossible events had occurred, one full share of the trust fund would have become the absolute property of Mrs. Thwing, and would pass upon her death to those who might be entitled then to claim under her, presumably entire strangers to the blood of the testator; and this within little more than two years after his own decease. The fact that similar results may follow the limitation to his children's heirs at law will not justify us in applying by construction a restriction to these words which he did not choose himself to apply. We cannot override his plain words upon the strength of an imagined general intent which he has neither expressed nor manifestly implied, and which would be at variance with the language which he has used. Accordingly we are of opinion that the surviving husbands of Mrs. Lucas and Mrs. Cowles respectively became entitled as heirs at law to the shares of their respective wives to the extent of $5,000 in amount. Nor do we think it material whether either or both of these husbands have hitherto received anything from the estates of their deceased wives. The bequests to the heirs at law of these children designate not only the persons who are to take, but also the amount and proportions in which they are to take; that is, under Pub. Sts. c. 124, § 1, the husband to the extent of $5,000, and under Pub. Sts. c. 125, § 1, cl. 5, the surviving brothers and sisters and the issue of those who are dead to the rest of the share. See *Cummings* v. *Cummings*, 146 Mass. 501, 507; *Rand* v. *Sanger*, 115 Mass. 124, 128; *Holbrook* v. *Harrington*, 16 Gray, 102, 104; *Daggett* v. *Slack*, 8 Met. 450, 453; *Lawrence* v. *Crane*, *Proctor* v. *Clark*, and *Lavery* v. *Egan*, *ubi supra*. The right of these husbands is established by the fact that they are included under

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the term "heirs at law" as used by the testator. They take directly from the testator; they do not inherit from their respective wives a share of the estates in remainder held by the latter; and the cases of *Watson* v. *Watson*, 150 Mass. 84, *Baker* v. *Baker*, 167 Mass. 575, and *Hill* v. *Pike*, 174 Mass. 582, relied upon by the defendants having interests adverse to theirs, are not applicable.

It remains to be determined whether the proceeds of real estate originally held in the trust fund, but sold and changed into personal property by the trustees before April, 1898, in accordance with the power given to them by the will, should be treated as real estate. It is to be observed that the will does not direct that the real estate be converted into personal, but simply gives the trustees power to sell and convey and to make new investments; and this has been already found to be a circumstance of weight in determining the construction of the words "heirs at law." If the conversion had been directed by the testator, or if he had contemplated the making of such a conversion before the taking effect of his final limitations, the proceeds of the real estate would be treated as personal property. *Lawrence* v. *Crane*, 158 Mass. 392, 393. *Hammond* v. *Putnam*, 110 Mass. 232, 237. But where as here there is a mere power to change investments, the fund resulting from a sale of real estate retains its original character until it reaches one who has the right to treat it as his own absolutely and for all purposes. *Hovey* v. *Dary*, 154 Mass. 7. *Holland* v. *Adams*, 3 Gray, 188, 191. *Holland* v. *Cruft*, 3 Gray, 162. Accordingly we are of opinion that the proceeds of the realty originally forming part of the trust estate are to be treated as realty in making distribution of the trust fund until the final vesting of the right to them in the parties ultimately entitled. Whether this can be done more conveniently by specifically following out the different investments which have been made, or, as has been suggested by counsel for one of the defendants, by having the share of any deceased issue or heir at law that is undisposed of by will go to his heirs and to his administrator in the ratio which the real estate belonging to the share originally bore to the personalty, is a practical question with which we do not need to deal.

Mrs. Lucas died in 1885. Her heirs at law were her husband;

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her surviving brother and sisters: Joseph Whittemore, Mrs. Cowles and Mrs. Gifford; the children of her deceased brother Thomas: Thomas Whittemore and George L. Whittemore; the children of her deceased brother Benjamin: John, Charles, Otis, Benjamin and Frank Whittemore; and the daughter of her deceased sister Mrs. Ruggles, Josephine P. Harrington. Out of the share of which the income was originally paid to Mrs. Lucas, accordingly, the sum of $5,000 is first to be paid to the executor of the will of her deceased husband. The residue of this share is to be divided into six parts. The first of these parts vested on the death of Mrs. Lucas, subject to the life estate of her husband, in the children of her brother Thomas. One half of this part is now to go to George L. Whittemore; the other half part was finally vested in Thomas Whittemore the younger, and apparently passed by his will, upon his death in 1890, to his widow, Winifred L. Whittemore; and upon her death intestate in 1898, the right to receive this half part passed to the defendant Dyer, the administrator of her estate, and should now be paid to him accordingly. The second part is to be paid in equal shares to the children of Benjamin B. Whittemore; the third part to the daughter of Mrs. Ruggles. The fourth part became vested in Joseph Whittemore, and has now passed by his will and that of his widow to his son Thomas; and he is now entitled to receive this share. The fifth part became vested in Mrs. Cowles, and upon her death in 1895 was a part of her estate; and the plaintiffs must determine whether they can safely pay it over to the persons entitled as her heirs or distributees, or whether an administrator of her estate must be appointed. *Heard* v. *Read*, 169 Mass. 216, 220. The sixth part vested in Mrs. Gifford, and upon her death in 1898 passed to her children George P. Gifford and Anna E. Bowman, subject to the same considerations, as already stated.

Mrs. Cowles died on June 8, 1895. Her heirs at law were her husband; her surviving sister Mrs. Gifford; the children of her deceased brothers Thomas, Benjamin B. and Joseph; and the children of her deceased sister Mrs. Ruggles. Her share accordingly became vested to the extent of $5,000 in her husband, John E. Cowles; one fifth part of the residue in Mrs. Gifford; and one fifth part in the children respectively above

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named; and payments should be made accordingly. It is unnecessary to go further into detail, as the same principles are to be applied which have been fully stated in dealing with the case of Mrs. Lucas.

The plaintiffs are to be instructed that the share of which Joseph Whittemore originally received the income is now to go to his issue, and the shares of which the income was paid to Mrs. Lucas and Mrs. Cowles are to be divided among their respective legal heirs above stated.

So ordered.

WILLIAM O. KANE *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. April 2, 1906. — June 20, 1906.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Negligence.

A boy, thirteen years of age, who, while sitting on the side of a pung loaded with boxes by permission of the driver, was injured from being struck by an electric car coming from the opposite direction, cannot recover from the railroad company for his injuries, if the accident was caused by the negligence of the driver in driving so near the tracks that the plaintiff's knees necessarily struck the car and would have done so even if the car had stopped before the pung reached it.

TORT, by a boy thirteen years of age when injured, for personal injuries received on December 15, 1902, from being struck by a car of the defendant while he was sitting on the side of a pung loaded with grease boxes by permission of the driver of the pung. Writ in the Municipal Court of the Roxbury District dated August 10, 1903.

On appeal to the Superior Court the case was tried before *Stevens*, J., and the jury returned a verdict for the plaintiff which was set aside by the judge. Later there was a new trial before *Wait*, J., who ordered a verdict for the defendant; and the plaintiff alleged exceptions.

M. L. Jennings, for the plaintiff.

R. A. Sears & J. E. Hannigan, for the defendant.

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SHELDON, J. There is no occasion to go over the evidence in this case in detail. It could lead to no other conclusion than that the driver of the pung in which the plaintiff was sitting drove so near to the defendant's tracks as to cause the plaintiff's knees to strike against the car which was passing in the opposite direction. Under the circumstances of this case the plaintiff cannot recover if either his own negligence or that of the driver contributed to the happening of the accident. *Evensen* v. *Lexington & Boston Street Railway*, 187 Mass. 77, 78. *Yarnold* v. *Bowers*, 186 Mass. 396, 398, and cases there cited. Even if there had been evidence of any negligence in the management of the defendant's car, yet it could not be said that such negligence was the cause of the accident. The plaintiff himself testified that the trouble was that the driver of the pung drove too near the tracks, and that even if the car had stopped the driver of the pung would have driven him (the plaintiff) against the car; and there was no other testimony in the case inconsistent with this. The circumstances are not like those disclosed in *Aiken* v. *Holyoke Street Railway*, 180 Mass. 8, 12, 13. The verdict for the defendant was rightly ordered.

Exceptions overruled.

JENNIE M. PURDON *vs.* GEORGE R. BLINN, receiver.

Suffolk. April 2, 1906. — June 20, 1906.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Absentee. Marriage and Divorce, Alimony. *Words*, "Debt."

A decree for alimony in a gross sum is a debt which may be proved against an absentee within the meaning of R. L. c. 144, § 9, and may be ordered to be paid out of the proceeds of his property in the hands of a receiver appointed under that chapter.

In proving a debt against an absentee under R. L. c. 144, § 9, to be paid out of the proceeds of his property in the hands of a receiver appointed under that chapter, a proper general notice to the receiver and to persons within the jurisdiction interested in the estate is sufficient without personal notice to the absentee, which in most cases to which the statute applies would be practically impossible.

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PETITION, filed in the Probate Court for the county of Suffolk on December 19, 1905, under R. L. c. 144, § 9, by Jennie M. Purdon of Winchester who was granted a divorce from James L. Purdon, formerly of Boston, by the Superior Court for the county of Middlesex, which became absolute on September 8, 1905, by which decree James L. Purdon was ordered to pay the petitioner the sum of $4,000 in gross as alimony, praying that the petitioner's claim for $4,000 might be proved as a debt against James L. Purdon and against his property and estate now in the hands of George R. Blinn of Bedford appointed under R. L. c. 144 as receiver to the property of James L. Purdon, an absentee, and for an order directing the payment of the petitioner's claim out of such property.

A citation was issued on the petition ordering service by mail or personal service, and also by publication, upon the receiver and the children of the absentee, and the service was made as ordered. The Probate Court appointed Charles H. McIntyre, Esquire, to act as next friend of all persons not ascertained or not in being and also appointed him guardian *ad litem* for Evelina T. Purdon, a minor child of the absentee and the petitioner. As next friend and as guardian *ad litem* he filed his assent to the granting of the petition. The Probate Court made a decree allowing the petitioner's claim and ordering that the payment be made, subject to the reservation of the amounts which might be necessary to pay the expenses of the receivership and for the support and maintenance of Evelina T. Purdon. The receiver appealed.

The appeal came on to be heard before *Hammond*, J. No persons were present, or represented by counsel, other than the petitioner, the receiver and the guardian *ad litem* and next friend. No notice was given other than that required in the citation issued by the Probate Court. With the consent of these parties the justice reported the case for determination by the full court, such decree to be entered, or such other disposition to be made of the case, as to the full court should seem meet.

G. Z. Adams & G. R. Blinn, for the receiver.

F. A. Fernald, for the petitioner.

KNOWLTON, C. J. This is a petition brought under the R. L. c. 144, § 9, relative to property in the hands of a person appointed receiver of the estate of a resident of the Common-

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wealth who "has disappeared, absconded or is absent therefrom and has left no agent therein and his whereabouts are unknown." This section is as follows: "The court may order said property or its proceeds acquired by mortgage, lease or sale to be applied in payment of charges incurred or that may be incurred in the support and maintenance of the absentee's wife and minor children, and to the discharge of such debts as may be proved against said absentee."

The petitioner was the wife of the absentee, and she obtained from him a divorce *a vinculo*, with a decree for alimony in gross to the amount of $4,000. For this execution was issued, and she made her petition to the Probate Court to have it proved and allowed as a debt against the estate of her former husband, in the hands of the receiver. The principal question in the case is whether this is a debt, within the meaning of the statute.

The origin of the claim in the obligation of the husband to provide for her support does not militate against its allowance; for the statute provides for the payment of charges of this kind which are not directly debts. A decree for alimony in a gross sum, which is a final adjudication for the payment of the amount named, is within the constitutional provision that "full faith and credit shall be given in each state to the . . . judicial proceedings of every other state." A suit may be brought to enforce the payment of it as a debt, in a State other than that in which it was entered. *Page* v. *Page*, 189 Mass. 85. An obligation under such a decree is plainly in the nature of a debt, and for most purposes it can fairly be called a debt. In *Gray* v. *Bennett*, 3 Met. 522, 526, the court said: "The word 'debt' is of large import, including not only debts of record, or judgments, and debts by specialty, . . . and in its popular sense includes all that is due to a man under any form of obligation or promise. And long ago it was held, as expressed by Blackstone, that 'whatever the laws order any one to pay, that becomes instantly a debt which he hath beforehand contracted to discharge.'" In *Howard* v. *Howard*, 15 Mass. 196, in referring to a liability for alimony, the court used this language: "The debt is certain, and it is proved by record; and the decree is, in effect, as much a judgment, as if rendered on the common law side of the court." Mr. Justice Field, in *Knapp* v. *Knapp*, 134

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Mass. 353, said, "A decree for alimony, whether for alimony already due, or to become due in the future, is in a certain sense a debt of record established by a judgment." So in *Chase* v. *Chase*, 105 Mass. 385, Mr. Justice Morton, speaking of a divorce *a vinculo* and divorce *a mensa et thoro*, said, "The judgment for alimony in either case creates a debt of record in favor of the wife." It was held in that case, as it previously had been held in *Livermore* v. *Boutelle*, 11 Gray, 217, that a decree for alimony is a debt within the St. of 13 Eliz. c. 5, as to conveyances in fraud of creditors. In *Knapp* v. *Knapp*, 134 Mass. 353, and in *Burrows* v. *Purple*, 107 Mass. 428, there is language recognizing a decree for alimony in gross as a kind of debt.

The case of *Bailey* v. *Bailey*, 166 Mass. 226, following and explaining *Chase* v. *Ingalls*, 97 Mass. 524, decides that a liability for alimony is not "debt or damages in a civil action," within the meaning of the statute in regard to arrest upon execution. But it hardly affects the general question with which we are dealing. The decisions that claims for alimony are not provable in bankruptcy rest upon reasons that have little application to this case. We are of opinion that the word "debts" in this statute is used in its broad signification, and includes claims like that now before us.

The remaining question is whether this debt can be proved against the absentee and allowed against the property in the receiver's hands without personal notice to the absentee. From the nature of the case we think it must be provable, upon a proper general notice to the receiver and to persons within the jurisdiction interested in the estate. The reason for the appointment of the receiver is that the whereabouts of the owner of the property are unknown and he has left no agent properly to represent him in caring for his property, and to perform his obligations. In most cases to which the statute applies it would be practically impossible to give personal notice to the absentee. We are of opinion that the notice in the present case was sufficient. *Bonnemort* v. *Gill*, 167 Mass. 338. *Minot* v. *Purrington*, 190 Mass. 336.

Decree affirmed.

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NEW YORK BANK NOTE COMPANY *vs.* KIDDER PRESS MANUFACTURING COMPANY & others.

Suffolk. May 14, 1906. — June 20, 1906.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Contract, Validity. *Equity Jurisdiction*, To enforce negative contract, Laches. *Anti-trust Law. Corporation*, *Ultra vires. Estoppel. Assignment. Equity Pleading and Practice*, Defences, Hearings before master, Master's report, Petition to intervene. *Damages*, In equity for breach of contract. *Interest. Release. Payment.*

A contract in writing between a corporation which prints and sells strip tickets used by transportation companies and a corporation manufacturing an improved printing perfecting press, by which the manufacturing corporation sells a press to the printing corporation and agrees not to sell this type of press to other customers to be used by them for a similar purpose but reserves the right to make and sell the press for other uses for which it may be adapted, is valid.

If in a suit in equity by a corporation which sells strip tickets used by transportation companies, seeking damages from a corporation manufacturing an improved printing perfecting press for the alleged breach of an agreement in writing not to sell the type of press sold to the plaintiff to other customers to be used for a similar purpose, the defence that the contract sought to be enforced is void as in violation of 26 U. S. Sts. at Large, 209, commonly known as the anti-trust law, must be pleaded specially, and if the defendant files an answer and a cross bill in neither of which the point is taken, this defence is not open to the defendant.

If a corporation, organized under the laws of another State for the purpose of making and dealing in printing presses, sells a press to a corporation which sells strip tickets used by transportation companies and agrees in writing not to sell the same type of press to other customers to be used for a similar purpose, and receives and retains the price paid for the press and for its agreement, it cannot be permitted to repudiate its agreement as being in excess of its corporate powers.

If a corporation which prints and sells tickets used by transportation companies makes a valid contract in writing with a corporation manufacturing an improved printing perfecting press by which the manufacturing corporation sells it a press and agrees not to sell this type of press to other customers to be used by them for a similar purpose, the contract containing no provision for its assignment, and later in a reorganization the printing corporation conveys and assigns all its corporate property including choses in action to a new corporation, the manufacturing corporation not assenting to the assignment, the assignment passes to the new corporation any right of action against the manufacturing corporation for a breach of its agreement which occurred before the assignment, but does not assign the contract.

After a master has made a draft report and submitted it to the counsel for the

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parties, it is within his discretion to determine how far if at all he will reopen the hearing and admit further evidence offered by either party after hearing their objections and before finally settling his report.

Where an order referring a case to a master does not require him to report the evidence and he does not report it, exceptions to his report which depend on a different view of the testimony from that taken by the master or which are based on the ground that some of his findings are not supported by sufficient proof cannot be considered.

An exception to the admission of evidence by a master cannot be sustained, although the evidence was admitted erroneously, if its admission has been made immaterial by the fact that neither the findings of the master nor those of the judge who heard the case were affected by it.

In a suit in equity by the assignee of the property and choses in action of a corporation which was engaged in the business of printing and selling strip tickets to transportation companies, against a manufacturing corporation which had sold a press to the plaintiff's assignor under a valid contract in writing by which it agreed not to sell this type of press to other customers to be used by them for a similar purpose, seeking to recover damages for a breach of this contract before the assignment by the sale of a press to another corporation to be used for a similar purpose, the measure of damages is the difference between the value of the press purchased by the plaintiff's assignor when fitted for use in printing strip tickets and protected by the restriction of the contract and its market price after the depreciation caused by the defendant's sale in violation of the contract, with interest from the date of the breach.

Where a plaintiff is entitled to damages for a breach of contract he also is entitled to interest from the date of the breach as compensation for delay in payment.

In a suit in equity by the assignee of the property and choses in action of a corporation which was engaged in the business of printing and selling strip tickets to transportation companies, against a manufacturing corporation which had sold a press to the plaintiff's assignor under a valid contract in writing by which it agreed not to sell this type of press to other customers to be used by them for a similar purpose, to recover damages for a breach of this contract by the sale of a press to another corporation to be used for a similar purpose, a decree was made that the plaintiff was entitled to damages in a certain amount named, but the further facts appeared that the plaintiff first had brought an action of contract in this Commonwealth, to which the suit in equity was ancillary, and then had brought an action in another State against the corporation to which the press had been sold by the defendant in violation of its contract, and in the action in the other State had been compelled to join the defendant as a party, and thereafter had received from the purchasing defendant in the action in the other State a sum of money in settlement of all damages and had executed a release under seal to that defendant of all damages and demands, and had consented to an order discontinuing the action in the other State as against the defendant paying the money, the release executed by the plaintiff containing a declaration that it was not intended to release any claim which the plaintiff had against the defendant in the Massachusetts suit who sold the press to the plaintiff. *Held*, that, even if the reservation by the plaintiff of his claim against the defendant in the release prevented that instrument from being a full discharge, the payment was to be treated as a partial satisfaction and must be applied by the plaintiff in reduction of the sum awarded to him by the decree.

The petition of a foreign corporation to intervene in a suit in equity in this Com-

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monwealth properly may be denied when for many years the petitioning corporation has been engaged in litigation in another State founded upon a contention contrary to that which it alleges as the ground for its admission as a party, and where its admission would delay the doing of justice between the parties already before the court.

BILL IN EQUITY, filed in the Superior Court on June 13, 1898, by the New York Bank Note Company, a corporation organized under the laws of the State of West Virginia and having its principal place of business in the city of New York, the successor under a reorganization of a corporation of the same name organized under the laws of the State of New Jersey, against the Kidder Press Manufacturing Company, a corporation organized under the laws of the State of Connecticut and having its principal place of business in the city of Boston, and Eugene A. Bascom, having a usual place of business in Boston, the assignee under a voluntary conveyance from the Kidder Press Manufacturing Company of its entire assets, in trust, alleged to be in fraud of the plaintiff's rights, praying, first, that the defendant corporation and the defendant Bascom might be enjoined from selling or disposing of any of the assigned property under or in accordance with a published notice of a mortgagee's sale, second, that the defendant Bascom might be enjoined from continuing and conducting hereafter the business of the defendant corporation and from making any new contracts for the manufacture of printing presses for others, third, that some suitable person might be appointed as receiver to take possession of all the assets and property of the defendant corporation and administer and wind up the same under the order of this court, fourth, that the trust created under the conveyance to the defendant Bascom might be executed only under the order and direction of this court, and that the defendant Bascom, or some suitable person appointed as trustee in his place, might be ordered and adjudged to collect as soon as might be all bills receivable, and debts due the defendant corporation and sell for cash all manufactured and salable product now on hand and apply the proceeds in payment of the outstanding indebtedness of the defendant corporation, and fifth, for further relief.

By an interlocutory decree of June 20, 1898, receivers were appointed. On July 13, 1898, a cross bill was filed by the Kidder

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Press Manufacturing Company by leave of court. On September 27, 1898, the original plaintiff filed a petition for the removal of the receivers, and the appointment of others in their stead. By a decree of January 19, 1899, the receivers and certain creditors of the corporation on their petition were made parties to the suit. On May 28, 1902, the receivers filed their fourth report and a petition for an order of final distribution or for instructions. On May 2, 1904, the plaintiff filed a petition for distribution.

On February 13, 1905, there was a hearing upon the petition of the receivers for distribution or for instructions filed May 28, 1902, and an interlocutory decree was made that the case be assigned for hearing on April 3, 1905, at the equity session of the Superior Court upon the issue whether or not the plaintiff was a creditor entitled to participate in the fund in court, and that the petition of the receivers be reserved for the further consideration of the court.

On April 3, 1905, an order was made under Chancery Rule 35 appointing a commissioner to take the evidence to be reported to this court.

On May 1, 1905, *Fessenden*, J. made the following decree:

"This cause came on to be heard under the interlocutory decree dated February 13, 1905, and after hearing evidence and arguments of counsel, it appearing to the court that the contract of October 12, 1891, between the New York Bank Note Company of New Jersey and the defendant the Kidder Press Manufacturing Company was entered into by and between such parties, as stated in the plaintiff's bill, and that the said contract was afterwards assigned by the said New York Bank Note Company of New Jersey to the plaintiff by an assignment dated December 27, 1892; and it appearing to the court that said contract was not assignable without the assent of said defendant; and it further appearing to the court that said assignment was not assented to by the said defendant; and it further appearing to the court that the said defendant prior to said December 27, 1892, and in said December, 1892, committed a breach of said contract as follows, viz: by the sale of a certain press to the Hamilton Bank Note Engraving and Printing Company, and that the plaintiff by virtue of said assignment acquired a right

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of action against said defendant for and on account of said breach of said contract, and that said defendant prior to said assignment committed no other breach of said contract, and that in such respect and such respect alone the plaintiff is a creditor of said defendant; thereupon and in consideration thereof it is ordered, adjudged and decreed that this cause be, and the same hereby is, referred to James R. Dunbar, Esquire, as special master, to hear the parties and to determine the amount of damages, if any, occasioned by such breach of such contract, the hearings to begin forthwith and to continue from day to day, said special master to file his report on or before the first Monday of July, 1905."

The defendant corporation appealed "from so much of the decree of this court, dated May 1, 1905, as finds that prior to December 27, 1892, and in December, 1892, the defendant committed a breach of the contract of October 12, 1891, referred to in said decree, by the sale of a certain press to the Hamilton Bank Note Engraving and Printing Company, and that the plaintiff by virtue of the assignment dated December 27, 1892, referred to in said decree, acquired a right of action against the defendant for and on account of said breach of said contract, and that in such respect the plaintiff is a creditor of the defendant."

On June 6, 1905, the New York Bank Note Company, organized under the laws of the State of New Jersey, filed a petition for leave to intervene. The petition was denied; and that corporation appealed.

On November 8, 1905, the special master filed a report. He found that the damages caused by the breach of contract were $11,400; that the right of action to recover such damages passed from the New Jersey company to the plaintiff by assignment; and that the damages which the plaintiff was entitled to recover were $11,400, and interest thereon from December 24, 1892.

Both the plaintiff and the defendant corporation filed exceptions to the report.

On January 27, 1906, *Fox*, J. made a decree overruling all the exceptions of both parties and confirming the report, ordering that the clerk pay to the plaintiff out of the fund deposited with him by the receivers the sum of $20,349, being the damages found due by the master as the depreciation in value of the

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printing presses owned by the New York Bank Note Company of New Jersey at the time of the breach of contract and caused by the breach, and interest thereon from December 24, 1892, to the date of the decree, with interest on that sum from the date of the decree to the date of payment, and the further sum of $583.88 as costs. The defendant corporation appealed.

On February 19, 1906, the receivers by leave of court filed an amendment to their petition for an order of final distribution or for instructions, alleging that the New York Bank Note Company of West Virginia on February 6, 1906, received from the Hamilton Bank Note Engraving and Printing Company of New York the sum of $12,500 in full settlement of all damages occasioned by the breach of the contract of October 12, 1891, between the New York Bank Note Company of New Jersey and the Kidder Press Manufacturing Company, including all damages occasioned by the sale of the Kidder Perfecting Press in December, 1892, the basis of the master's report and the decree of January 27, 1906; that the New York Bank Note Company executed to the Hamilton Bank Note Engraving and Printing Company a release under seal of all damages and demands, including all damages occasioned by the breach of December, 1892; that the New York Bank Note Company had consented to an order discontinuing the action as against the Hamilton Bank Note Engraving and Printing Company; that the action had been discontinued by the court as against the Hamilton Bank Note Engraving and Printing Company, a copy of the agreement for discontinuance being annexed; and that the payment, release and discontinuance were a bar to any further recovery of damages by the New York Bank Note Company against the said Kidder Press Manufacturing Company; praying the court to hear and determine the question whether the payment, release and discontinuance were such a bar, and if the court should determine such to be the effect of the payment, release and discontinuance, that the receivers might be allowed to pass their final accounts, and that an order of distribution of the surplus assets among the stockholders of the Kidder Press Manufacturing Company might be made, or for further instructions from the court.

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The plaintiff filed an answer to the amendment of the receivers' petition, alleging that it received the sum of $12,500 named in the amendment from the Hamilton Bank Note Engraving and Printing Company in settlement of a separate and distinct cause of action against that company; that the release included no damages or demands occasioned by the breach of contract mentioned in the amendment; also that the settlement with the Hamilton Bank Note Engraving and Printing Company was entirely made, executed and carried out in the State of New York, and that by § 1942 of the Code of that State "joint debtors may compound separately"; so that even assuming that the Hamilton Bank Note Engraving and Printing Company and the Kidder Press Manufacturing Company were joint debtors of the plaintiff, which the plaintiff denied, the causes of action against the Hamilton Bank Note Engraving and Printing Company and that against the Kidder Press Manufacturing Company were entirely separate and distinct.

The release executed by the plaintiff contained the following declaration:

"This release is not intended to release any claim which said New York Bank Note Company now has or may have against the Kidder Press Manufacturing Company, a Connecticut corporation, and is made in pursuance of the statute in such case made and provided."

On March 7, 1906, the case came on to be heard before *Richardson*, J., who reported it to this court as follows:

"This cause came on to be heard before me after the appeal taken by the defendant Kidder Press Manufacturing Company from the decree entered herein on January 27, 1906, upon the amendment to the receivers' petition for order of final distribution which amendment was filed on February 19, 1906, and upon the answer of the plaintiff to said amendment, and having heard the parties thereon, I make the following findings of fact in addition to the facts already appearing in the record on appeal from the decree of January 27, 1906, which record is made a part of this report, upon all the material issues raised by said amendment and answer, and report the same to the full court.

"The plaintiff corporation received from the Hamilton Bank

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Note Engraving and Printing Company of New York on February 6, 1906, the sum of $12,500 and assented to the discontinuance as against the Hamilton Bank Note Engraving and Printing Company of a certain action pending in the Supreme Court of the State of New York, and said action was thereupon discontinued as against the Hamilton Bank Note Engraving and Printing Company, and the plaintiff also executed to said Hamilton Bank Note Engraving and Printing Company a certain release, and assented to the cancellation of two bonds filed in said action for $50,000 each, and one bond of $500, and said bonds were thereupon cancelled. . . .

"I find that said action in the Supreme Court of the State of New York was originally begun by the plaintiff against the Hamilton Bank Note Engraving and Printing Company as sole defendant, and that the said Hamilton Bank Note Engraving and Printing Company demurred on the ground, among others, that the Kidder Press Manufacturing Company ought to have been made a party. This demurrer was sustained by the New York court, the decision thereon is reported in 83 Hun, 593, which is made a part hereof and may be referred to but need not be printed, and the plaintiff amended and made the Kidder Press Manufacturing Company a party defendant.

"The Kidder Press Manufacturing Company was a nonresident of the State of New York, but its treasurer, W. P. Kidder, was personally served in New York City, which service was good legal service upon that corporation under the laws of New York.

"At the time of said payment the case in the Supreme Court of the State of New York was pending against the Hamilton Bank Note Engraving and Printing Company and the Kidder Press Manufacturing Company.

"I find that the said discontinuance, release, receipt and payment of said sum by the plaintiff all took place within the State of New York and that the entire settlement of the plaintiff with the Hamilton Bank Note Engraving and Printing Company was a New York contract, and I further find that the Law of New York as contained in sections 1942 and 1207 of the Code of that State is as follows:

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"'§ 1942. Joint debtors may compound separately. Mode and effect.

"'A joint debtor may make a separate composition with his creditor, as prescribed in this section. Such a composition discharges the debtor making it; and him only. The creditor must execute to the compounding debtor a release of the indebtedness, or other instrument exonerating him therefrom. A member of a partnership cannot thus compound for a partnership debt, until the partnership has been dissolved by consent or otherwise. In that case the instrument must release or exonerate him, from all liability incurred by reason of his connection with the partnership. An instrument, specified in this section, does not impair the creditor's right of action against any other joint debtor, or his right to take any proceeding against the latter; unless an intent to release or exonerate him, appears affirmatively upon the face thereof.'

"'§ 1207. When judgment for plaintiff not to exceed judgment demanded.

"'Where there is no answer, the judgment shall not be more favorable to the plaintiff, than that demanded in the complaint. Where there is an answer, the court may permit the plaintiff to take any judgment, consistent with the case made by the complaint, and embraced within the issue.'

"The receivers contended and asked the court to rule that the payment by, and release to, the Hamilton Bank Note Engraving and Printing Company of February 6, 1906, is a bar in whole or in part to the recovery of damages by the said New York Bank Note Company against the said Kidder Press Manufacturing Company as decreed by this court under date of January 27, 1906.

"The plaintiff contended and asked the court to find and rule that said payment, release and discontinuance in no way affected its right to recover the amount fixed by the decree entered in this cause on January 27, 1906, from the respondent Kidder Press Manufacturing Company.

"I declined to rule as requested by the receivers, but found and ruled as requested by the plaintiff and ordered a decree in accordance therewith.

"But being of the opinion that this decree so affects the merits

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of the controversy between the parties that the matter ought to be determined by the full court before further proceedings are had, at the request of the parties, I report the question for that purpose to the full court, such decree to be entered as justice may require."

The contract for the breach of which the plaintiff was given damages was made between the plaintiff's predecessor, the New York Bank Note Company, organized under the laws of the State of New Jersey, and the defendant corporation, and was dated October 12, 1891. Its material provisions were as follows:

"33. It is hereby agreed that the price of the press shall be the sum of Four thousand Five hundred dollars ($4500.) but that the amount of this contract shall be the sum of Six Thousand Dollars ($6000.) the additional Fifteen hundred dollars ($1500.) being a payment to the Kidder Press Company by the New York Bank Note Company for an insurement, protection, guarantee, contract and delivery to the Bank Note Company of a monopoly of all future machines built or that may be built by the Kidder Press Company or any party on the lines of its patents on the press herein contracted for, upon which there can or may be printed strip tickets substantially the same as those now printed by the New York Bank Note Company, or of similar form or design, to wit:

"34. The Kidder Press Company hereby agrees not to sell any presses on which strip tickets may be printed, as aforesaid, that they make, control, are interested in the patents on, may be interested in the patents on, or have been interested in the patents on, to any one except the New York Bank Note Company, the object being to insure the said press or presses against being used for the printing of strip tickets of form, design or purpose similar to those now printed or that may be printed by the Bank Note Company upon the press now operated by it, purchased from the Kidder Press Company. But there is nothing in this contract, nor is it the intention of either of the contracting parties, to limit the sale of this press alluded to above either as the one now used in the Bank Note Company purchased from the Kidder Press Company, or the one hereby contracted for to be delivered to the Bank Note Com-

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pany by the Kidder Press Company, for any purpose except for printing of strip tickets substantially the same as those now made by the Bank Note Company. On the contrary it is the pleasure of the Bank Note Company, its officers and directors, as well as, presumedly, the profit of the Kidder Press Company, that it shall make, sell, deliver and collect the money for as many presses similar to the one now in use by the Bank Note Company, heretofore adverted to, or the one hereby ordered from the Press Company, and shall enjoy all of the emoluments of the utmost possible extension to the Press Company's business by reason of the sale of printing presses identical with those herein alluded to.

"35. The Fifteen hundred dollars ($1500.) paid or to be paid to the Kidder Press Company, as herein mentioned, is for the purpose of securing to the New York Bank Note Company whatever advantages may arise from the impossibility of any of its competitors obtaining or using a press built by the Kidder Press Manufacturing Company of substantially the same design as those with [*sic*] which the Bank Note Company is contemplating using in its strip ticket business aforesaid.

"36. This contract shall remain in force not to exceed a term of twenty years from the date of this contract.

"37. The Press Company hereby agrees not to make alterations or additions to any existing presses that they have already built that would enable the press to print strip tickets, without requiring the parties owning press, or might buy it thereafter, to make the same terms and agreements regarding it as though it were a new machine.

"38. The Kidder Press Company hereby states that the only presses of their manufacture upon which strip tickets can be possibly run are as follows: —

"One owned by Allen, Lane & Scott of Philadelphia, and

"One owned by Weed, Parsons & Co. of Albany.

"And the Kidder Press Company hereby agrees not to sell any press to either of the two foregoing concerns without an agreement which shall bring the presses that they now have, as above enumerated, capable of printing strip tickets, within the same restrictions as though these two presses above enumerated were sold to them now, subsequent to the date of this contract.

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"39. It is hereby agreed and assented to by the Kidder Press Company and the New York Bank Note Company that the most feasible and proper way to protect the interests of the Bank Note Company in and to the proper control and ownership hereby acquired in the Kidder Perfecting Press, which is the technical name by which the machinery herein adverted to is known, is that whatever sales of this press or presses are made by the Kidder Press Company shall be made to the New York Bank Note Company for the account of the party desiring to use the press or presses, and the New York Bank Note Company shall execute a perpetual lease to said third party for such money as the Kidder Press Company shall nominate; but the New York Bank Note Company shall in no wise part with the title in and to the machine delivered, but shall retain its actual ownership of the press or presses under agreements permitting its use for all purposes except strip tickets, within the United States; but that the presses shall not under any pretext whatever be taken out of the jurisdiction of the United States of America during the said twenty years. And this form of agreement, as substantially set forth herein, it is hereby agreed by the Kidder Press Company shall be used in whatever sales are made of its perfecting presses. And the New York Bank Note Company shall deliver to the Kidder Press Company the full consideration it (the Press Company) may nominate, and the Bank Note Company shall have its own agreements with the purchaser in accordance with the above plan, and litigate at the Bank Company's own expense the agreements with said purchaser or purchasers if the agreements are broken."

V. J. Loring, for the Kidder Press Manufacturing Company.

B. C. Moulton, *V. J. Loring* & *F. B. Greenhalge*, for the receivers.

A. H. Wellman, for a majority of the stockholders and certain creditors of the Kidder Press Manufacturing Company.

E. P. Lyon, *I. R. Clark* & *G. F. Ordway*, for the plaintiff.

BRALEY, J. The right of the plaintiff as a creditor to participation in the distribution of the assets in the possession of the receivers depends primarily upon the validity and construction of the contract made between the defendant corporation and the New York Bank Note Company of New Jersey, and later

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assigned to the plaintiff. Appeals having been taken by all parties from the interlocutory decrees, the various questions of title, of liability and of the measure of damages, if the plaintiff is entitled to prove for any amount, are open. At the outset it appears that the defendant corporation, being engaged in the manufacture and sale of an improved printing perfecting press, entered into a contract with the plaintiff's assignor, a corporation which printed and sold strip tickets used by transportation companies, by the terms of which, among other provisions, it agreed not to sell this type of press to other customers to be used by them for a similar purpose. While the defendant corporation was left unrestricted to make and vend the press for other uses to which it might be adapted, yet as the principal object was to create a partial monopoly the first contention is that for this reason the contract was void. At common law a sound public policy was held to require that the individual effort and competition which furnished an opportunity for earning a livelihood or the extension of trade should be unrestricted, as the welfare of the community demanded that the industrial and business activity of its members should be unhampered. But a distinction was early recognized between contracts which wholly restricted trade, and those which partially limited its development and extension either as to territory or to persons; the first being held void, while the latter, if reasonable, have been upheld as valid. *Gamewell Fire Alarm Telegraph Co.* v. *Crane*, 160 Mass. 50, 56. *Anchor Electric Co.* v. *Hawkes*, 171 Mass. 101, 105. *Diamond Match Co.* v. *Roeber*, 106 N. Y. 473. The nature of the business in which the New Jersey company was engaged appears to have been of such character that it was not unreasonable for its own protection that a stipulation should be inserted which left the defendant corporation at liberty to sell this press to all the world for other purposes, but prohibited sales to those who by their competition might and probably would ruin its business, and this restriction, therefore, did not render the contract invalid. *Morse Twist Drill & Machine Co.* v. *Morse*, 103 Mass. 73. *Gibbs* v. *Consolidated Gas Co.* 130 U. S. 396. 2 Kent Com. note (x) 467, *Restraint of Trade*, and cases there collected. *New York Bank Note Co.* v. *Hamilton Bank Note Engraving & Printing Co.* 180 N. Y. 280.

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The defendant corporation further contends that the contract was in violation of the act of Congress of July 2, 1890, (26 U. S. Sts. at Large, 209,) commonly known as the anti-trust law, but, if applicable, neither in its answer nor by its cross bill is this ground for relief directly or inferentially stated. If at inception the contract was void as being prohibited by this statute, then to be available such a defence must be specially pleaded. R. L. c. 173, § 27. *Granger* v. *Ilsley*, 2 Gray, 521. *Bradford* v. *Tinkham*, 6 Gray, 494. *Rice* v. *Enwright*, 119 Mass. 187. *Hunting* v. *Downer*, 151 Mass. 275, 278.

It also is urged as another reason for avoidance that the contract was not within the scope of the defendant corporation's express or implied corporate powers. But it is a foreign corporation, and the terms of its charter are not shown. It is alleged in the original bill and is not denied by the answer, that it was organized for the purpose of making and dealing in printing presses, of which the manufacture and sale of the perfecting press comprised only a part. While created for the purpose of engaging in a particular kind of business, there was no prohibition upon the form of contracts it might adopt to effect a sale of its product, and it should not be permitted to repudiate as being in excess of its corporate powers a transaction which is otherwise valid and under which it received and has retained the consideration, when such a course must result in positive injury to the plaintiff. *Slater Woollen Co.* v. *Lamb*, 143 Mass. 420, 421. *Prescott National Bank* v. *Butler*, 157 Mass. 548, 549. *Nims* v. *Mount Hermon Boys' School*, 160 Mass. 177, 179.

The contract being neither immoral nor void for want of corporate authority, the defendant corporation became bound to its full performance. Without reviewing the evidence there was abundant proof to support the finding that by the sale of a similar press to the Hamilton Bank Note and Engraving Company, without the assent of the New Jersey company, there was a breach by the defendant corporation which entitled the New Jersey company to recover damages. But although this corporation was dissolved without having brought suit, and was succeeded by the present plaintiff, to which all of its corporate property including choses in action was conveyed and assigned, the fiduciary relations between the parties under the terms of the contract

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relating to the proceeds of other sales were such, that, without a provision to that effect, which is not found, or without the defendant corporation's assent, which was not given, the plaintiff was not substituted, and hence the assignment passed only the bare right of action which previously had accrued to the assignor. *Boston Ice Co.* v. *Potter*, 123 Mass. 28, 30. *New York Bank Note Co.* v. *Hamilton Bank Note Engraving & Printing Co., ubi supra. Robinson* v. *Drummond*, 2 B. & Ad. 303. *Arkansas Valley Smelting Co.* v. *Belden Mining Co.* 127 U. S. 379. *Delaware County Commissioners* v. *Diebold Safe & Lock Co.* 133 U. S. 473. *Burck* v. *Taylor*, 152 U. S. 634.

Upon the entry of an interlocutory decree which thus properly defined and limited the plaintiff's claim, the case was referred to a master for the assessment of damages. To his report numerous exceptions were taken by both parties concerning the exclusion and admission of evidence, as well as to the rule adopted by him for the ascertainment of damages. While no appeal was taken by the plaintiff from the decree overruling the exceptions and confirming the report, the defendant corporation having appealed, its exceptions are next to be considered. These exceptions so far as they relate to the reopening of the hearing after the submission of the draft report call for no comment, as the admission of further evidence offered by either party after hearing their objections and before finally settling his report was within the master's discretion. Under the decretal order the master was not required to report the evidence, and those exceptions which either depend upon a different view of the testimony, or are based on the ground that some of his findings were not supported by sufficient proof, are not tenable and may be dismissed without further remark. *O'Brien* v. *Murphy*, 189 Mass. 353.

The remaining exceptions, which relate to the measure of damages, present the principal question.

It is evident that the plaintiff endeavored to obtain compensation based upon the difference between the cost of printing tickets and their price which the assignor was receiving under its contracts. But this estimate not having been taken as a measure of computation either by the master or the trial judge, the defendant corporation has not been prejudiced by evidence

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admitted in support of this position, and its exception to such admission becomes immaterial. The report recites that the parties agreed that the sale to the Hamilton company was before the date of the assignment, and, as this sale was the specific act of violation, whatever cause of action the New Jersey company possessed then accrued. At that time the assignor owned two presses which if new could have been bought in the market for much less than the sum paid for the second press, the price of which also was taken as the basis of valuation of the first press bought before the contract was made. The value of both presses when fitted for use in printing strip tickets, and protected by the restriction, may be fairly said to have been equal, and besides, this value even if divided by the recitals in the contract was the total estimate fixed by the agreement. *Parker* v. *Simonds*, 8 Met. 205, 213. The difference between this amount, which as to one press was enhanced by the cost of certain mechanical changes, and the market price established the loss caused by the depreciation, and provided a correct measure of compensation. What further elements of damage might have been presented if the assignor had continued in business and brought suit need not be considered, as within this limit at least it would have been entitled to recover. *Westfield* v. *Mayo*, 122 Mass. 100, 105. *Sargent* v. *Franklin Ins. Co.* 8 Pick. 90, 99. *Noble* v. *Ames Manuf. Co.* 112 Mass. 492, 497. *Somers* v. *Wright*, 115 Mass. 292. *Townsend* v. *Nickerson Wharf Co.* 117 Mass. 501. *Manning* v. *Fitch*, 138 Mass. 273, 277. *Whitehead & Atherton Machine Co.* v. *Ryder*, 139 Mass. 366, 371. *Abbott* v. *Hapgood*, 150 Mass. 248. The addition of interest was proper, for the amount assessed became due when the contract was broken, and as the plaintiff should be fully compensated it ought not to suffer loss from the delay in payment. *Hovey* v. *Newton*, 11 Pick. 421, 422. *Ainsworth* v. *Lakin*, 180 Mass. 397. *Peabody* v. *New York, New Haven, & Hartford Railroad*, 187 Mass. 489.

But although none of the exceptions can be sustained, it also is contended that this assessment should be reduced by deducting a sum subsequently received by the plaintiff from the Hamilton company. This question comes up in the form of a report which states that all the facts relating to the material

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issues appearing in the record of the entire litigation are to be considered in its determination. After bringing an action at law in this State, which appears still to be pending and to which the original bill in the present case is ancillary, the plaintiff proceeded with an action against the Hamilton company already begun in another jurisdiction. A demurrer having been interposed, it had been obliged to join the defendant corporation as a party. *New York Bank Note Co.* v. *Hamilton Bank Note Engraving & Printing Co.* 83 Hun, 593. And instead of prosecuting the action here, in which any liability of the defendant corporation could have been speedily determined, it chose to proceed with the litigation in another forum. *New York Bank Note Co.* v. *Hamilton Bank Note Engraving & Printing Co.* 180 N. Y. 280. But wherever prosecuted, and whether at law or in equity, the plaintiff at common law had only one cause of action, namely, the chose assigned by the New Jersey company. It now suggests notwithstanding the express allegations of the bill before us to the contrary that the defendant corporation was joined merely as a matter of form, while relief and damages were asked only as to the principal defendant. When, however, the history of the entire controversy is read, form ceases to be of primary importance, and whatever the plaintiff's attitude the only object sought was the recovery of damages from both parties, and for relief by injunction solely because this defendant had broken its contract. *New York Bank Note Co.* v. *Kidder Press Manuf. Co.* 176 Mass. 151, 152. The multiplication of actions for the same cause whether sounding in tort or contract does not have the effect of multiplying damages, and while the release under seal is couched in general terms, no attempt was made to show the existence of any other demand, and it is to be assumed that the suit was brought and prosecuted in good faith. *Smith* v. *Way*, 9 Allen, 472. *Burnett* v. *Smith*, 4 Gray, 50. Indeed the discontinuance of the action and the discharge of the bond sufficiently indicate that the compromise was regarded as a settlement of the litigation with the releasee. See *Brown* v. *Cambridge*, 3 Allen, 474, 476; *Aldrich* v. *Parnell*, 147 Mass. 409. It is not material to determine whether the defendant corporation and the Hamilton company were joint debtors within the meaning of § 1942 of the Civil Code of the State of New York,

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relating to the compounding of claims against joint debtors, under which one debtor is not discharged by settlement with the other, as the plaintiff's claim had not been merged in a joint judgment. Before this settlement had been effected the amount which the plaintiff could recover had been established by a decree of a court of competent jurisdiction, to the final decision of which it had submitted its cause. In either jurisdiction, although the breach of the contract in itself was not a tort, it was entitled to but one satisfaction of damages, whether obtained by compromise when unliquidated, or by payment after the amount had been ascertained and adjudicated. *Vanuxem* v. *Burr*, 151 Mass. 386, 388, 389. In *Stimpson* v. *Poole*, 141 Mass. 502, 505, it was said "money paid, which is to be in full for an unliquidated or a disputed claim, is taken in discharge of it, and constitutes a full defence against any further assertion of the claim. What has been received is in law deemed to be a satisfaction of the claim." That the Hamilton company in fact might not have been liable to respond does not affect the adjustment or the application of the payment. *Leddy* v. *Barney*, 139 Mass. 394, 397. If the reservation by the releasor that it did not relinquish its claim against the defendant corporation prevents the release from being a full discharge, the receipt of a partial payment likewise is to be treated as a partial satisfaction which the plaintiff must apply in reduction of the sum awarded by the decree. *Brown* v. *Cambridge*, *ubi supra*. *Wood* v. *Mann*, 125 Mass. 319. *Hudson* v. *Baker*, 185 Mass. 122, 125. This conclusion being adverse to the plaintiff, it then contends that the appeal of the New Jersey company from a decree which denied a petition for leave to intervene should be sustained. After many years of litigation, when it became apparent that the contract was unassignable, this right is asked for the purpose of getting enhanced damages, which if recoverable would go to the plaintiff, but if for no other reason the lapse of time, united with the persistent and unsuccessful effort to maintain a contrary proposition in the courts of another State at a large expense to the estate, is sufficient to justify the refusal by a court of equity to allow further delay doing manifest injustice to other creditors as well as to the debtor. *Cooke* v. *Barrett*, 155 Mass. 413, 414.

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We do not find it essential to consider specifically other questions of procedure raised by the appeal of the receivers and referred to in their brief. It may be presumed that until their accounts are passed and the claims of intervening creditors have been adjusted no order for distribution will be made, and that payment to the plaintiff will not be ordered until these steps have been taken.

It follows from what we have said that all the interlocutory decrees and orders from which appeals have been taken are affirmed. But while affirming the second decree because no error is found therein at the time of entry, it is to be modified, either by an interlocutory or in the final decree, by deducting from the amount of damages the payment received by the plaintiff, with such allowance of interest at the legal rate as may be considered expedient.

Ordered accordingly.

NATHANIEL A. ELDRIDGE *vs.* SELECTMEN OF CHATHAM.

Suffolk. May 16, 1906. — June 19, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, BRALEY, & SHELDON, JJ.

Elections. Municipal Corporations.

Under R. L. c. 11, §§ 266, 267, except in towns where the official ballot is used or where the officers are "voted for on one ballot," there can be no recount of the votes cast for an officer of a town after the result of the election has been announced and recorded and the meeting has been adjourned.

PETITION, filed March 5, 1906, by Nathaniel A. Eldridge of Chatham for a writ of mandamus addressed to Meriton E. Nickerson, Alvin Z. Atkins and Oliver E. Eldredge, acting as selectmen of that town, commanding the respondents Nickerson and Atkins to recognize the petitioner as a selectman and member of their board in place of the respondent Eldredge, and commanding the respondent Eldredge to refrain from intruding himself as a member of that board or doing any act as such member.

The case came on to be heard upon the petition and answers

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before *Hammond*, J., who reported it for determination by the full court, such action to be taken as law and justice might require.

The justice made the following findings:

"I find that at the town meeting the tellers duly appointed by the moderator reported that for the office of selectman, assessor and overseer of the poor the petitioner received one hundred and fifty-two votes and the respondent one hundred and forty-nine votes, and that thereupon the moderator announced that the petitioner was elected and the records of the clerk were made up accordingly and were approved before the meeting adjourned; and that upon such adjournment no question was made of the petitioner's election.

"As to the ballots I find that they were tied and carefully kept together, but not placed in a sealed envelope, and at the close of the announcement by the moderator were delivered by one of the tellers into the possession of the town clerk, who retained them until they were delivered to the board of registrars for a recount. I find that the recount was carefully conducted and that the petitioner was represented by counsel, who at the close of the recount said he was satisfied and suggested in substance to the registrars that their certificate of the result of the recount should close with a statement that the town records should be amended in accordance therewith, but I do not find that any of the rights to insist upon the invalidity of the recount were waived either by the petitioner or by his counsel. I find that the registrars had before them all the ballots and none others which were cast at the election, and, if it be material, I find that the recount shows the true result of the election, namely, that the petitioner had only one hundred and fifty-one votes, while the respondent had one hundred and fifty-two votes.

"I find that the petition for the recount was not sworn to by any of the subscribers thereto, but only by the respondent, Oliver E. Eldredge, and that the town clerk before whom it was sworn was not a justice of the peace nor a notary public, but was town clerk and a member of the board of registrars.

"At the hearing the petitioner contended that the declaration by the moderator was the official declaration of the result of the

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election; that there was no provision in law for the recount of votes cast at such an election, and moreover that even if there was, the petition was not sworn to by the right persons or before the proper officer. The respondents contended that the recount was in accordance with law, and that the result was the legal result of the election."

C. Bassett & F. Ranney, for the petitioner.

H. A. Harding, for the respondents.

KNOWLTON, C. J. At a meeting of the voters of the town of Chatham for the election of town officers, after the votes had been counted it was announced by the moderator that the petitioner had received one hundred and fifty-two votes for the office of selectman, assessor and overseer of the poor, and the respondent Oliver E. Eldredge had received one hundred and forty-nine votes. The petitioner was then declared elected, and due record was made accordingly. Afterwards he took the oath of office and entered upon the performance of his duties. Upon these facts it would appear that he was duly elected, and he would be entitled to hold the office throughout its term if there were nothing to deprive him of the right.

Subsequently measures were taken to obtain a recount of the ballots. A recount was made by the registrars of voters. They found that the respondent Eldredge had received one hundred and fifty-two votes and the petitioner only one hundred and fifty-one votes, and the records of the town were amended accordingly. The respondent Eldredge has been recognized by the other respondents as duly elected, and is now in the performance of the duties of the office. The questions are whether such a recount was authorized by the statute, and whether this recount was inaugurated and conducted in accordance with the provisions of law, so as to deprive the petitioner of the office to which he was regularly declared elected at the town meeting.

As proceedings for a recount of votes are strictly statutory, they are of no effect unless they are authorized by the statute and begun and conducted as the statute provides. The town did not use the official ballot, and the town clerk, selectmen, assessors, treasurer, collector of taxes and school committee were not voted for on one ballot. It is only when one or the other of these conditions exists that the statute provides for

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enclosing the ballots in envelopes and preserving them. R. L. c. 11, §§ 239, 345. Under the R. L. c. 11, §§ 266, 267, when an application for a recount of votes is made, "the envelopes containing the ballots, sealed," are to be transmitted by the town clerk to the registrars of voters, who are to "open the envelopes, recount the ballots and determine the questions raised." These sections, which are the only ones providing for a recount of votes after an election of town officers, are applicable only to those cases where the statute requires the ballots "to be publicly enclosed in an envelope and sealed up with the seal provided for the purpose." It follows that, except in towns where the official ballot is used, or where the officers above mentioned are "voted for on one ballot," no recount of votes can be had after the result of the election has been announced and recorded and the meeting has been adjourned. This view is strengthened by reference to similar provisions of earlier statutes. St. 1886, c. 262, § 2. St. 1886, c. 264, § 11. St. 1890, c. 423, §§ 97, 226. St. 1893, c. 417, §§ 174, 208, 276. It therefore becomes unnecessary to consider the other alleged defects in the proceedings on which the recount was founded, some of which appear to be important.

As the registrars of voters had no jurisdiction to recount the votes, the result of their action cannot be considered, and the election declared by the voters in town meeting is valid.

Peremptory writ of mandamus to issue.

EVANGELICAL BAPTIST BENEVOLENT AND MISSIONARY SOCIETY *vs.* CITY OF BOSTON.

Suffolk. November 21, 1905. — June 21, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Tax, Exemption. *Statute*, Construction. *Evangelical Baptist Benevolent and Missionary Society. Tremont Temple.*

The provision of St. 1857, c. 154, § 2, that the Evangelical Benevolent and Missionary Society incorporated by that chapter "may hold real and personal estate to the amount of three hundred and fifty thousand dollars, which property, and

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the net income thereof after the same has been paid for, shall be appropriated exclusively for the purposes in this act specified, and the same shall be exempted from taxation," exempts from taxation the property of that corporation only to the amount named, and does not operate as a specific exemption from taxation of the first property acquired by the corporation which consisted of real estate worth at the time of its acquisition less than $350,000. *Hardy* v. *Waltham*, 7 Pick. 108, and *Harvard College* v. *Boston*, 104 Mass. 470, distinguished.

MORTON, J. This is an action of contract to recover back taxes alleged to have been assessed and collected unlawfully. The taxes were assessed as of May 1, 1903. The case was submitted to the Superior Court on agreed facts, and a *pro forma* finding was made for the defendant from which the plaintiff appealed.

The plaintiff is the owner of the land and building on Tremont Street, Boston, known as Tremont Temple, the total valuation of which as determined by the assessors in 1903 was $935,000. From this the assessors deducted the sum of $350,000 and assessed the plaintiff on the balance. This deduction was made pursuant to § 2 of c. 154 of the Acts of 1857, under which the plaintiff was incorporated and organized. That section is as follows: "Section 2. Said corporation may hold real and personal estate to the amount of three hundred and fifty thousand dollars, which property, and the net income thereof after the same has been paid for, shall be appropriated exclusively for the purposes in this act specified, and the same shall be exempted from taxation." The property was acquired by the plaintiff in 1858, and the total value of the land and building was then and continued for some years to be less than $350,000. In 1893 the building was destroyed by fire and a new one was built at a cost of upwards of $346,000. For purposes of assessment the land was valued at $611,000 and the building at $324,000, making the total of $935,000 referred to above. The plaintiff contends, in substance, that the effect of the section quoted above is to exempt from taxation property acquired by it up to the value of $350,000 regardless of the subsequent increase in value, and that as the plaintiff had no other property, so far as appears, when this was acquired, and it was less than $350,000 in value, it comes within the exemption. In other words it contends that the exemption is specific rather than general in character, and attached for the benefit of the plaintiff

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to particular parcels as acquired up to the limit named. In support of this contention it relies upon the cases of *Hardy* v. *Waltham*, 7 Pick. 108, and *Harvard College* v. *Boston*, 104 Mass. 470. These cases arose under the charter of Harvard College where the language is quite different from that in the case before us. The material part of the charter is printed in the margin in *Harvard College* v. *Boston*, *supra*, pages 473, 474. The provision relating to exemption is as follows: "And further, be it ordered by this court and the authority thereof, that all the lands, tenements and hereditaments, houses or revenues, within this jurisdiction, to the aforesaid president or college appertaining, not exceeding the value of five hundred pounds per annum, shall from henceforth be freed from all civil impositions, taxes and rates." This was construed in the cases above referred to as exempting specifically lands and tenements not exceeding in value five hundred pounds per annum. There is an intimation in *Harvard College* v. *Boston*, upon page 489, that if the question were a new one, a different construction might be adopted. However that may be, the language of the charter particularly exempts lands, tenements, hereditaments and houses not exceeding in value the amount named. The exemption therefore is not only an exemption of a given amount of property but of the specific parcels of which it may be composed. In the present case the plaintiff is given the general right to hold property to the amount of $350,000, and then it is provided generally that "the same shall be exempted from taxation." The intention was to provide that the corporation could hold property to a given amount and to exempt that amount from taxation. It follows that all above that amount however and whenever acquired is liable to taxation. This is the construction on which the assessors have acted. There is no contention that the property is exempt on any other ground, and the result is that the judgment must be affirmed.

So ordered.

J. R. Dunbar & H. M. Davis, for the plaintiff.

T. M. Babson, for the defendant.

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JOHN J. DUNPHY *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. November 23, 24, 1905. — June 21, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Negligence, Employer's liability. *Elevated Railway.*

In an action against an elevated railway company by a workman in its employ for personal injuries, if it appears that the plaintiff was put at work by a superintendent of the defendant upon a track on a loop of the defendant's elevated structure over which trains frequently were passing, both the superintendent and the plaintiff knowing it to be a dangerous place, that the plaintiff looked up to see whether a train was approaching and the superintendent, who was standing near, saw him do it and said "All right, Jack," that thereupon the plaintiff went on with his work and was struck and knocked off the track by a passing train, and was injured, that an approaching train could be seen one hundred and fifty feet away, and that the superintendent as he stood there was doing nothing and gave the plaintiff no warning of the approach of the train, this warrants a finding that the plaintiff was justified in assuming that the superintendent was looking out for him and in acting accordingly, and therefore was in the exercise of due care, and also warrants a finding that the superintendent was negligent.

MORTON, J. The plaintiff was struck and knocked off the track by a passing train while working in the defendant's employment on the loop at the Dudley Street terminal station of the defendant's railway in Boston, and this is an action to recover for the injuries thereby received. The declaration contained five counts, the first being at common law and the others under the employers' liability act. The second count was for injuries caused by negligence on the part of a person entrusted with and exercising superintendence, whose sole or principal duty was that of superintendence. The case was submitted to the jury on this count only, the judge ruling that there was no evidence entitling the plaintiff to recover under the other counts. There was a verdict for the plaintiff, and the case is here on the defendant's exceptions.

We think that the ruling was right. The plaintiff was set to work by Boyd, the superintendent, in what both knew to be a dangerous place. According to the plaintiff's testimony he looked up to see if a train was approaching, and Boyd, who was

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standing near, saw him do it and said "All right, Jack," and the plaintiff went on with his work. This, if believed, warranted the jury in finding that the plaintiff was in the exercise of due care and was justified in assuming that Boyd was looking out for him and in acting accordingly. The evidence showed that an approaching train could be seen one hundred and fifty feet away and that Boyd stood there with nothing to do, but gave the plaintiff no warning of the approach of the train that struck him. This warranted a finding of negligence on the part of Boyd. It was not contended that Boyd was not a superintendent. See *Davis* v. *New York, New Haven, & Hartford Railroad*, 159 Mass. 532; *Scullane* v. *Kellogg*, 169 Mass. 544; *Greenstein* v. *Chick*, 187 Mass. 157; *Lynch* v. *Stevens & Sons Co.* 187 Mass. 397.

Exceptions overruled.

C. F. Choate, Jr., for the defendant.

H. E. Bolles, (*H. M. Channing* with him,) for the plaintiff.

EFFIE HOFFMAN, executrix, *vs.* HARRIS HOFFMAN & another.

Suffolk. December 11, 1905. — June 21, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Will, Undue influence. *Evidence*, Circumstantial.

A finding that the execution of an instrument purporting to be a will was procured by fraud or undue influence can be sustained on evidence which is wholly circumstantial.

At the trial of an appeal from a decree of the Probate Court allowing a will, the jury found that the testator was of sound and disposing mind and memory, and also found that the alleged will was procured to be made through the fraud or undue influence of the testator's second wife who was named in the instrument as executrix. It appeared that at the time of the marriage the second wife was thirty years of age and the alleged testator seventy-five years of age and unattractive in person, and there was evidence warranting a finding that the marriage on the part of the wife was wholly mercenary. There was evidence that after the marriage the relations between the testator and his children and their families, and his old friends, which formerly had been affectionate and intimate, underwent a great change, and that after the marriage he saw them very little, that before the marriage the testator had declared repeatedly that he would not make a will and that his property should go according to law and

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his children should have it, that he promised his first wife in her last sickness that he would see that the children had it, that by the instrument purporting to be his will he left to each of his children the sum of $2,000, increased from $1,000 at the suggestion of his legal adviser, and left all the rest of his estate amounting to upwards of $50,000 to his second wife, that he requested the scrivener in drawing his will to make a memorandum that his wife did not know of the matter, that at the time the instrument was executed he was a feeble old man suffering from a complication of diseases incident to his age and was mentally in a condition to be easily influenced by a designing person. *Held*, that the court could not say that the jury were not warranted in finding that the execution of the instrument was procured by fraud or undue influence on the part of the testator's second wife named as executrix.

MORTON, J. This is an appeal from a decree of the Probate Court allowing the will of Andrew Hoffman. The case was tried before the Chief Justice of this court. Two issues were submitted to the jury: 1. "Was the testator of sound and disposing mind and memory at the time of the execution of the instrument propounded for probate as his last will?" and 2 "Was the alleged will procured to be made through the fraud and undue influence of Effie Hoffman?" The jury answered both questions in the affirmative. At the close of the evidence the executrix asked the court to rule that there was no evidence tending to show that the alleged will was procured through the fraud or undue influence of Effie Hoffman. The court declined so to rule, and the case is here on exceptions by the executrix to the refusal to give the ruling thus requested. All of the evidence is reported.

We think that the ruling was right. There was no direct evidence that the will was procured by fraud and undue influence on the part of Mrs. Hoffman; but the jury had all the facts and circumstances before them, and we cannot say as matter of law that the conclusion to which they came was unwarranted.

The executrix was the second wife of the testator. His first wife died in April, 1899, and he himself died in November, 1903. At the time of the marriage the executrix was thirty years old and he was seventy-five. She lived in Nova Scotia with her father, where the testator saw her in August, 1899, for an hour in the presence of others for the first and only time, so far as appears, till he met her later in Boston. A month afterwards she received a letter from him proposing marriage. There had been no communication between them in the meantime. She

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answered it and afterwards came to Boston. She saw him about three weeks after her arrival, and in December they became engaged and on the twenty-third of that month they were married. His children were neither invited to nor informed of the marriage. There was evidence tending to show that he was unattractive in person and that she made inquiries or was informed about his property, and a jury would be warranted in finding that the marriage was a mercenary one on her part. If her motives were mercenary the exercise of undue influence on her part would be more readily inferred than if they were not. There was testimony tending to show that after his marriage the relations between the testator and his children and their families, and old friends, and his previously declared intentions and views underwent a great change. His son had been in business with him for twenty years, and their relations had been pleasant and harmonious. Without any just cause, as it could have been found, the testator terminated this connection, and left the son to look out for himself and treated him in other ways very differently from what he had before. Before the marriage the grandchildren were on affectionate terms with their grandfather and were in and out of his house and frequently took their meals there. This ceased after the marriage. Calls made by the son's wife were not returned, although the relations between her and the testator continued pleasant.

The intimacy between the testator and an old and intimate friend — a Mr. Ships — gradually waned after the marriage without any cause on Ships' part, and when he spoke to the testator about it, he said that his wife was not well disposed towards Ships' wife, showing or tending to show that she had acquired an influence over him. Before the marriage the testator declared repeatedly that he would not make a will, and that his property should go according to the law and his children should have it. He promised his first wife in her last sickness that he would see that the children had it. After the marriage he made two wills, the only difference between them being that he omitted from the last a legacy of $500 to the church of which he was a member which was contained in the first, and it was only at the suggestion of his legal adviser that he increased from $1,000 each to $2,000 each the legacies to his children. All the rest of the

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estate, which amounted to upwards of $50,000, was given to the second wife. And he made of the scrivener the somewhat unusual request, to say the least, that he would make a memorandum, which he did, that his wife did not know of the matter. Though the testatrix testified that she never saw the will or its contents or a copy till after the funeral, she did not testify that she did not know of the making of the will, though it is possible that she meant what she said to include that. Although the jury found that he was of sound mind, they might consistently with that have also found that physically he was, at the time the will was made, a feeble old man suffering from a complication of diseases incident to his age, and that mentally he was in a condition to be easily influenced by a designing person. We do not mean to intimate that there was not evidence contrary to or tending to explain various of the matters to which we have referred. But the question before us is not of the weight of the evidence, but whether it fairly warranted the conclusion to which the jury came.

Mere suspicion, however strong, is not of itself enough to warrant a finding of fraud and undue influence. On the other hand, it is not necessary that there should be direct evidence of fraud and undue influence in order to justify such a finding, though it often happens that such evidence is produced. It is of the nature of fraud and undue influence that they may be exercised in indirect and underhanded ways difficult to be come at, and to be judged of only by their results. The will of a testator may be coerced and fraud committed upon him in various ways, and what would constitute fraud and coercion in one case, might not in another. There is no hard and fast rule. A person may be so situated, so weak and feeble or so dependent on another, for instance, that mere talking to him or pressing a matter upon him would so affect him that, for the sake of quietness, he might do that which he did not want to do, and which, if his health had been better or his will stronger, he would not have done. Such a case would constitute or might be found to constitute coercion as truly as force or duress. *Wingrove* v. *Wingrove*, L. R. 11 P. D. 81. So in relation to fraud, representations or acts which would make no impression or a slight impression on a man of mature years in the full possession of his bodily and

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mental faculties might readily affect one who from age and infirmity was less capable of weighing things truly and was more dependent on those about him.

In the present case the testator was advanced in years when the will was executed, and was or might have been found to be in feeble health and in a condition which rendered him an easy prey to one in marital relations with him. The marriage was or might have been found to be a wholly mercenary one on the part of the executrix. Indeed it would seem to be idle to suppose that it could have been otherwise. The making of the will and the disposition of his estate were contrary to the intentions of the testator as repeatedly expressed by him before his marriage. And the manner in which the estate was disposed of was or might have been found to be grossly unreasonable and unjust and in substance and effect wholly regardless of the claims which his children had upon him. These and other things which occurred after the marriage might have been found to be more consistent with the successful accomplishment of a scheme on the part of the wife to so dominate and control him as to lead him to execute a will in her favor contrary to his previously declared intentions and contrary to what he would have done if left to himself, than any other view.

The burden of proof was on the appellants; but, taking all the circumstances into account, we cannot say, as already observed, that the jury were not warranted in coming to the conclusion that the will was procured by fraud and undue influence on the part of the executrix.

Exceptions overruled.

R. M. Morse, for the appellee.

F. H. Stewart, for the appellants.

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ALEXANDER SAMPSON *vs.* FREDERICK HOLBROOK & others.

Middlesex. December 13, 14, 1905. — June 21, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Negligence, Employer's liability.

An experienced carpenter, who for a long time has been used to handling heavy timbers with a derrick and who is employed with others under the orders of a superintendent in moving by means of a derrick a pile of timber which has been left as it was when unloaded, need not be instructed or warned that if while one of the timbers is being moved by the derrick it swings around and hits the pile another of the timbers may fall, and assumes the obvious risk of an injury from such a cause.

TORT for personal injuries sustained while the plaintiff was in the defendants' employ as a carpenter. Writ dated June 20, 1902.

At the trial in the Superior Court before *Mason*, C. J. it appeared that at the date of the accident, which occurred on April 4, 1902, the defendants were engaged in rebuilding Lincoln Wharf in Boston; that one Logan was the general superintendent in charge; and that there were employed upon the work over fifty or sixty men; that the plaintiff was hired by Logan and went into the employ of the defendants as a carpenter on or about March 1, 1902; that on the night before the accident just as the men were quitting work Logan told one Landry that there was a load of lumber out in the yard and directed him to take it in in the morning. The happening of the accident is described in the opinion.

At the close of the plaintiff's evidence, the Chief Justice ruled that upon all the evidence the plaintiff was not entitled to recover, and ordered a verdict for the defendants. The plaintiff alleged exceptions, which after the death of *Mason*, C. J. were allowed by *Fessenden*, J.

F. J. Carney, for the plaintiff.

W. H. Hitchcock, for the defendants.

MORTON, J. The evidence would have warranted a finding that Landry was a person whose sole or principal duty at the

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time of the accident was that of superintendence. But there was nothing to warrant, we think, a finding that the accident was due to any negligence on his part, or that of the general superintendent, or of the defendants.

On the night before the accident Landry had been directed by Logan, the general superintendent, to take in, in the morning, a load of lumber that was out in the yard. The lumber consisted of seven sticks of hard pine, twenty-five to thirty feet long and twelve inches square, piled just as it had been left when unloaded. In the morning Landry took four or five men, including the plaintiff, and, with an engineer to run the derrick, proceeded to move the timber. He directed some of the men, of whom the plaintiff was one, to hook on to one of the sticks, which they did, and then he "told the engineer to go ahead, and we swung it around a little ways." When it got "a little ways" he had them move the hooks back so as to give a chance to pull the whole stick round, and, when one of the men, Bennett, said "all right," Landry told the engineer to go ahead. The stick swung toward a building and the plaintiff, who was on the inside between the stick and the building, jumped over the stick to keep from being caught between it and the building and was up against the pile when one end of the stick struck the building and the other end swung around against the pile causing one of the timbers to fall and break his leg. The plaintiff was a carpenter and testified that he thoroughly knew the business and that he "had for a long time been used to handling heavy timbers with a derrick." There was nothing in the situation that was not as obvious to him as it was to Landry. He required no instruction or warning from Landry, or any one else. If the timbers were not piled as they should have been it was as plain to him as to any one. He and the men who were with him did in their own way the work which they were directed to do, and it cannot be said that there was anything negligent in the way in which Landry undertook to move the timber or that he did or omitted to do anything which in view of the plaintiff's experience he ought or ought not to have done. The timber was to be moved as it was piled, and the danger that one of the sticks might fall was, we think, an obvious risk incident to the employment and as such was assumed by the plaintiff. See *Campbell*

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v. *Dearborn*, 175 Mass. 183; *Allard* v. *Hildreth*, 173 Mass. 26; *Thompson* v. *Norman Paper Co.* 169 Mass. 416; *DeLisle* v. *Ward*, 168 Mass. 579; *Lothrop* v. *Fitchburg Railroad*, 150 Mass. 423.

Exceptions overruled.

HENRY P. WALSH *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. December 15, 1905. — June 21, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Negligence. Elevated Railway.

In an action against a corporation operating an elevated railway for an injury from particles of metal thrown out in the operation of the railway falling into the plaintiff's eye as he was passing under the elevated structure and looked up when he heard the noise of a train overhead, there was evidence that at the time of the accident a shower of such metal particles called "sparks" came down, that showers of sparks descended from the elevated structure with great frequency, that the sparks were or might be thrown out by reason of the friction of the contact shoe upon the third rail which supplied the electricity for moving the defendant's trains, that by the adoption of a different kind of shoe the injurious "sparking" might be avoided, or that a shield could be placed underneath the third rail to prevent the falling of the sparks into the highway. *Held*, that the question of the due care of the plaintiff in looking up as the train was passing overhead, the question whether the particles that got into the plaintiff's eye came from the train, and the question whether the defendant did all that reasonably could be required of it to prevent sparks from falling and injuring persons using the street beneath, were for the jury with proper instructions from the presiding judge. Following *Woodall* v. *Boston Elevated Railway*, *ante*, 306.

TORT against the Boston Elevated Railway Company for an injury on June 16, 1902, from several particles of metal thrown out in the operation of the elevated railway of the defendant falling into the plaintiff's eye as he was passing along a public highway at City Square in that part of Boston called Charlestown. Writ dated July 11, 1902.

At the trial in the Superior Court before *Fox*, J. it appeared that, as the plaintiff was passing along a public highway at City Square in Charlestown under the defendant's elevated structure, a train came along; that its noise caused the plaintiff

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to look up; that a shower of sparks came down, and immediately something entered the plaintiff's eye; that afterwards, at the Carney Hospital, several particles were picked or cut out from his eye by a physician, which might have been metal, steel, quartz or anything hard; that the defendant's elevated system had been in operation since June 10, 1901; that showers of sparks descended with great frequency from the structure, falling to the ground or within a few feet of it; that the elevated railway was operated by means of a rail, called the "third rail," running parallel with the tracks on which the train ran and charged with electricity, which was used as a motive power by communicating the electricity to the trains by means of what are called "shoes," a shoe being a cast iron block attached to the cars composing the elevated trains, which slides along the top of the third rail, there being four shoes on each car, and each shoe being twelve or thirteen inches long and five inches wide; that the surface of the shoes when new would be a little rough; that when put in use they would be worn smooth, some shoes being worn a great deal more than others; and that there were worn places or gashes in the third rail.

An expert witness for the plaintiff testified that worn places or gashes in the third rail might be caused by the taking out or dislodging of particles owing to the contact of the shoes; that, if shoes were constructed with a somewhat rough cast iron surface resting on the rail and passing along with the motion of the cars, that would be a condition that would be likely to cause sparks or particles to be dislodged and thrown out; that sparks are caused by poor contact between the shoe and the rail; that the remedy for sparking would be to increase the amount of contact by the area or the number of points of contact on the third rail; and that a number of points of contact would enable the current to be transmitted to the motors of the car without injurious sparking; that another method that could be used to prevent the falling of sparks into the highway from the third rail would be by means of a shield placed underneath the third rail for its entire length or at points where passers by would be injured by the sparks falling; and that the sparking could have been prevented by the defendant at any time.

An expert called by the defendant contradicted many of the

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statements made by the expert for the plaintiff, but testified that the use of a bowspring on the shoes possibly might have lessened the sparking; that it would take three or four days' use when a new shoe was put in use to wear the surface smooth; and that a shoe could have been "machined" or made smooth before being put into use.

The judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

J. J. Mansfield, (*J. F. Creed* with him,) for the plaintiff.

E. P. Saltonstall, (*S. H. E. Freund* with him,) for the defendant.

O. O. Partridge & H. M. Channing, counsel for John S. Woodall,* plaintiff in the case reported *ante*, 308, submitted a brief by leave of court.

MORTON, J. This case is governed by *Woodall* v. *Boston Elevated Railway*, *ante*, 308. It cannot be said as matter of law that the plaintiff was not in the exercise of due care because he looked up as the train was passing overhead, or that there was no evidence which would warrant a jury in finding that the particles which got into his eye came from the train on the elevated railway. Whether the defendant did all that could reasonably be required of it to prevent sparks from falling and injuring pedestrians and others using the street beneath was a question, under proper instructions, for the jury. This and the other questions raised are considered in the case above referred to, and need not be further considered here.

Exceptions sustained.

* The case of Walsh was argued on December 15, 1905, before the case of Woodall. The case of Woodall was argued on January 16, 17, 1906, but was decided on June 20, 1906, one day before the case of Walsh was decided.

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JANE R. PIKE, administratrix, *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. December 15, 1905. — June 21, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Negligence. Street Railway. Evidence.

If a passenger, who is riding on the front platform of an electric car after he has read a sign stating that persons riding on the front platform do so at their own risk, is injured by a collision of the car with a repair wagon of the company operating the car, which would not have injured him had he been inside the car where there was room for him, he cannot recover from the company.

In an action against a street railway company for personal injuries from a collision while the plaintiff was riding on the front platform of an electric car of the defendant after he had read a notice stating that persons riding on the front platform did so at their own risk, evidence that the only other person on the front platform was the motorman, that the conductor collected the plaintiff's fare while he was there, and that nothing was said to him by the conductor or the motorman about standing on the platform, that persons frequently rode on the front platforms of the defendant's cars, that the conductors collected their fares there and that neither the conductors nor the motormen objected to their riding there, has no tendency to show that the defendant's rule had been waived or abandoned.

In an action against a street railway company for personal injuries from a collision while the plaintiff was riding on the front platform of an electric car of the defendant after he had read a notice stating that persons riding on the front platform did so at their own risk, the plaintiff on his cross-examination was asked whether he did not appreciate that if he rode on the front platform and suffered an accident he took the risk of its happening, and answered "I knew that the sign was a dead letter." *Held*, that this answer, at the most, was only an expression of opinion, and had no tendency to show that the rule had been waived or abandoned by the defendant.

MORTON, J. This is an action brought by the plaintiff's intestate in his lifetime, and prosecuted by the plaintiff as his administratrix after his death, to recover for injuiries sustained by him, while riding on the front platform of one of the defendant's cars, from a collision between the car and a repair wagon belonging to the defendant. The accident occurred on October 11, 1901, at about 5.30 A. M., the morning being dark and foggy.

The deposition of the original plaintiff was taken and he testified on cross-examination that he rode into town every morning on the electric cars and made it his custom to ride on the

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front platform, and had read the sign that passengers riding on the front platform did so at their own risk, and knew, if the sign was a rule of the company, that he took the risk of an accident happening, and that by standing on the front platform he was not breaking a rule of the company, but stood there at his own risk. It appeared that the only other person on the platform was the motorman. The plaintiff's intestate paid his fare and nothing was said to him by the conductor or motorman about standing on the platform. It was admitted by the defendant that people frequently rode on the front platform, the defendant contending that they did so subject to the rules of the company, and that fares were collected from them and that neither the conductors nor motormen objected to their so riding. For aught that appeared there was room enough inside the car, and it was not contended that the plaintiff's intestate would have been injured if inside the car. At the close of the evidence the judge, on the defendant's motion, ordered a verdict for the defendant, and the case is here on exceptions by the plaintiff to the ruling thus made.

We think that the ruling was right. The case seems to us to be governed by *Burns* v. *Boston Elevated Railway*, 183 Mass. 96, *McDonough* v. *Boston Elevated Railway*, 191 Mass. 509; and not, as the plaintiff contends, by *McNee* v. *Coburn Trolley Track Co.* 170 Mass. 283, and *Sweetland* v. *Lynn & Boston Railroad*, 177 Mass. 574. In the Sweetland case, the notice, as stated in the opinion, purported "to be a prohibition of passengers from riding on the front platform, and not a notice stating the terms on which they may ride there." In the present case the notice did not forbid passengers to ride on the front platform, but stated the terms on which, if they rode there, they would be carried, namely, at their own risk. In the McNee case the notice was similar to this, but there was only one elevator, and that was unsafe, and the workmen were expected to use it notwithstanding the notice. The same is true, in substance, of *Boyle* v. *Columbian Fire Proofing Co.* 182 Mass. 93. In the present case the defendant furnished a safe place for the plaintiff's intestate to ride in, and instead of riding there he rode on the front platform knowing that he thereby took the risk. There is nothing to show that the defendant provided the front platform uncondi-

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tionally as a place for its patrons to ride on. The remark of the original plaintiff in his cross-examination that the rule was a dead letter,* was, at the most, only an expression of opinion, and had no tendency to show that the rule had been waived or abandoned by the defendant. Neither did the fact that the conductors collected fares from the persons riding on the front platform and that neither they nor the motormen objected to their riding there tend to show that the rule had been waived or abandoned. Front platforms are not places ordinarily provided for passengers, and the conductors and motormen may well have supposed that persons riding there were content to do so under the rule and at their own risk.

Exceptions overruled.

G. W. Anderson, (*E. H. Ruby* with him,) for the plaintiff.

E. P. Saltonstall & S. H. E. Freund, for the defendant.

TULANE UNIVERSITY OF LOUISIANA *vs.* JOHN O'CONNOR & others.

Suffolk. January 15, 1906. — June 21, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, & SHELDON, JJ.

Alteration of Instruments. Guaranty. Corporation. Pleading, Civil, Declaration. *Practice, Civil*, Amendment.

If an unexecuted lease of real estate bearing upon it a guaranty of the performance of the covenants of the lease purporting to be under seal but with no seals affixed is executed by the guarantors and by the lessee, and thereafter one having no authority to do so affixes seals to the signatures of the guarantors and sends the lease to the lessor, who executes it with no knowledge of the alteration and delivers it to the lessee who occupies the premises under the lease, the lessor can sue the guarantors upon their contract of guaranty as if no seals had been placed opposite their names.

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* This portion of the cross-examination was as follows:

"*Q.* And appreciated that as far as that sign went, that if you rode on the platform, and suffered an accident, that you took the risk of its happening? *A.* I knew that the sign was a dead letter. — *Q.* But you said you had read the sign? *A.* Yes, sir. — *Q.* And you knew that as far as the sign went, that if the sign was a rule of the company, and if you rode on the platform, that you took the risk of an accident happening? *A.* Yes, sir."

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The provisions of St. 1903, c. 437, §§ 58, 60, requiring a foreign corporation doing business in this Commonwealth to appoint the commissioner of corporations its attorney on whom service can be made and to file a copy of its charter or articles of incorporation, apply only to business corporations and do not relate to an educational corporation organized under the laws of another State.

The facts that an educational corporation organized under the laws of another State owns a hotel which it leases to a tenant, that it has caused repairs to be made on the property, and, for some purpose which does not appear, has a representative in the liquor licenses issued to its lessee, do not make it a business corporation to which the provisions of St. 1903, c. 437, apply.

Under R. L. c. 173, § 8, a declaration in an action of contract against the guarantors of the performance of the covenants of a lease, who signed a guaranty providing that they should be severally and equally but not jointly liable, properly consists of different counts describing the different contracts entered into by the several defendants.

In an action upon a guaranty of the performance of the covenants of a lease, if the declaration is upon the guaranty as an instrument under seal and after the action is brought the fact is disclosed for the first time to the plaintiff that the defendants signed the guaranty without seals and that seals afterwards were affixed opposite their respective signatures by a stranger to the contract, the plaintiff may be allowed to amend his declaration by adding counts declaring upon the contract of guaranty as an unsealed instrument.

CONTRACT by the Tulane University of Louisiana, being the State university of Louisiana created and existing under certain statutes of that State, which under the residuary clause in the will of one Alexander C. Hutchinson, who died in December, 1902, had acquired the property known as the Hotel Plaza on Columbus Avenue in Boston, to recover rent due and unpaid under a lease to the defendant O'Connor, against that defendant as lessee, and against the other defendants as guarantors of the performance of the covenants of the lease. Writ in the Supreme Judicial Court dated July 12, 1904.

The case was tried before *Knowlton*, C. J. The course of the proceedings is described in the opinion, where also the material facts and the rulings made by the Chief Justice are stated.

The lease was dated October 29, 1903, and was for the term of one year from November 1, 1903, for the rent of $14,375, with an option to take a further lease for a term of four years at a rent of $15,000 per year.

The contract of guaranty was written upon the lease as follows:

"We the undersigned severally and equally but not jointly guarantee to the said Tulane University its successors and

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assigns the full and true performance by the said John O'Connor lessee under the within instrument of all the covenants conditions and agreements therein contained on his part to be performed and will each be liable for one third the amount of his breaches and defaults.

"And we especially agree that if and when any instalment of rent shall be due and unpaid we will pay the same upon written demand by the lessor or its representatives without further notice.

"In witness whereof we have hereunto set our respective hands and seals this 29th day of October 1903.

"George D. Emerson
B. J. Crowley [seal]
W. H. Rudd Son & Co. [seal]
Leopold Schlegelmilch" [seal]

Here followed the following agreement:

"It is hereby agreed by and between the Tulane University lessor and John O'Connor lessee contemporaneously with the execution and delivery of the foregoing lease that if the lessee shall exercise the option in said lease contained to take the premises for a further term of four years then and in that event he shall be entitled to a lease for the said further term only upon condition that he shall procure three guarantors satisfactory to said lessor or its representatives that the covenants of the said lessee shall be faithfully performed during said further term in default whereof the lessor may lawfully refuse to grant said further term.

"Witness our hands and seals this 29th day of October 1903.

"John O'Connor [seal]
Chas. E. Fenner, Presdt." [corporate seal]

"Witnessed by
"Carl E. Ward as to O'Connor"

After the Chief Justice had refused to give the rulings requested by the defendants which are quoted or described in the opinion, the defendants stated that, under these rulings, there were no questions on which they desired to go to the jury. The jury returned separate verdicts against Schlegelmilch and

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Rudd for $1,758.81 each, and against Emerson and Crowley, jointly, for $1,758.81.

The defendants alleged exceptions raising the questions which are dealt with in the opinion.

H. V. Cunningham, for the defendants.

E. R. Thayer, (*J. F. Curtis* with him,) for the plaintiff.

MORTON, J. This is an action against the guarantors of a lease made by the plaintiff to one O'Connor of the Hotel Plaza in Boston to recover a month's rent. O'Connor, the lessee, was a defendant, but before opening the case to the jury the plaintiff discontinued as to him, and also as to one other defendant. There was a verdict for the plaintiff, and the case is here on exceptions by the remaining defendants to certain rulings made by the court at the close of the evidence and to the refusal of the court to give certain rulings requested by them.

The principal contention of the defendants is that after they had signed it, the guaranty was materially altered by placing seals against their respective signatures without their knowledge or consent. There was evidence tending to show that the fact in regard to the seals was as alleged by them and that the seals were probably placed there by one Hamlen, a real estate agent, who had charge of the property for the plaintiff, and who died before the trial. The month and the day of the month, which were left blank in the date when the defendants signed, were filled in in his handwriting, and no objection thereto has been made by the defendants. The testimonium clause called for seals, and Hamlen may well have supposed that he was to affix them as well as to insert the month and the day of the month. It was undisputed that the defendants signed the guaranty, and that it was delivered to O'Connor after they had signed it and before O'Connor had signed the lease and that O'Connor signed the lease afterwards and before it was sent to the plaintiff. It was also undisputed that the lease and guaranty were sent by Hamlen to the plaintiff at New Orleans and that the lease was duly executed by representatives of the plaintiff on its behalf pursuant to a vote of the board of administrators of the Tulane educational fund which, it is not denied, was the proper body to act for and bind the plaintiff and that thereafterwards O'Connor entered and held under the lease. When the lease

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and guaranty were sent to the plaintiff they were in their present condition in all respects except that the lease had not been executed on behalf of the plaintiff. The defendants asked the court to rule on this branch of the case that, "The putting of the seal opposite the defendant's name without his knowledge or consent is a material alteration and voids the instrument altogether and the plaintiff cannot recover." The court declined to rule as thus requested, but ruled as follows: "There is no evidence that Hamlen was authorized to bind the plaintiff by a written lease, or to make any contract in writing for the occupation of the premises. If there were no seals opposite to the defendants' signatures when they signed the guaranty, and if Hamlen or some one in his office subsequently affixed seals there without authority and then forwarded the paper to the plaintiff, and the plaintiff examined and considered it for the purpose of determining whether to execute it, and delivered it to O'Connor without knowledge of the change made by Hamlen, and if O'Connor accepted it and held under it, the liability of the defendant in this action is the same as if no seals had ever been placed upon the guaranty."

1. We think that the ruling was right. It is not contended that there was any evidence that Hamlen was authorized to bind the plaintiff by a written lease, or to contract in writing for the occupation of the premises, or that the plaintiff had any knowledge that the seals had been affixed by him, if he did affix them, after the guaranty had been signed by the defendants. There was a good consideration for the guaranty as signed by the defendants and the addition of the seals must be regarded as the act of a stranger and therefore as not affecting the obligation created by the unsealed instrument or the right of the plaintiff to maintain an action upon it as such. See *Jeffrey* v. *Rosenfeld*, 179 Mass. 506. There is nothing to show that the plaintiff ratified Hamlen's act in putting on the seals or that it is estopped to rely upon the guaranty as it was before the seals were affixed. The ruling that was requested that the putting on of the seals rendered the guaranty void was therefore rightly refused.

2. The defendants contend in the next place that the action cannot be maintained because the plaintiff which is a foreign

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corporation had filed no certificate or power of attorney with the commissioner of corporations as required by R. L. c. 126, § 4, or St. 1903, c. 437, §§ 58–60. But those provisions apply to business corporations and not to literary or charitable institutions like the plaintiff. This is evident from an examination of the statutes. The act which was in force when this action was brought was St. 1903, c. 437, R. L. c. 126, having been repealed by St. 1903, c. 437, § 95. The foreign corporations referred to in St. 1903, c. 437, §§ 58, 60, which are required to file with the commissioner of corporations the power of attorney and the certificate therein provided for are such as may be organized under laws other than those of this Commonwealth for the purposes for which domestic corporations may be organized under § 7. Domestic corporations may be organized under § 7 for any lawful purpose not excluded by § 1 except buying and selling real estate and manufacturing intoxicating liquors. And § 1 applies, with some exceptions not now material, to "corporations having a capital stock and established for the purpose of carrying on business for profit"; in other words to business corporations. The facts that the plaintiff has caused repairs to be made on the property and, for some reason that is not disclosed, had a representative in the liquor licenses that were issued for the hotel do not constitute it a business corporation within the meaning of the statute. The case of *Santa Clara Female Academy* v. *Sullivan*, 116 Ill. 375, 384, cited by the defendants, is in the plaintiff's favor as we read it.

3. Lastly, the defendants contend that they cannot be sued jointly and separate judgments entered against them, and that by bringing an action upon the guaranty as altered the plaintiff has ratified the alteration and cannot now maintain an action upon the guaranty as it was before altered. R. L. c. 173, § 3, expressly provides that "all . . . persons who are severally liable upon contracts in writing . . . may be joined in one action" and that the declaration may contain one count only describing the several contracts if the same contract was made by all or different counts describing the different contracts if the same contract was not made by all. In this case the guaranty was signed by all of the defendants and provided that they should be severally and equally but not jointly liable and

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there were different counts describing the different contracts entered into by the defendants. The case is clearly within the statute. See also *Colt* v. *Learned*, 118 Mass. 380. The alleged alteration was not discovered by the plaintiff, it is said, till after the action had been brought and answers had been filed by the defendants setting it up, and at the close of the trial the plaintiff was permitted by the judge to amend its declaration by adding counts declaring upon the guaranty as an unsealed instrument. There is no ground for the contention that the plaintiff has lost any rights by election or ratification. It could not ratify what it did not know, and the defendants did not ask that it should be required to elect whether it would rely on the counts declaring on the guaranty as a sealed or an unsealed instrument, even if it could have been compelled to do so, but stated at the close of the evidence that they had no desire to go to the jury under the ruling made by the court, and verdicts were thereupon returned against the defendants Schlegelmilch and Rudd separately and Emerson and Crowley jointly, it being in substance agreed that they had intended to become jointly liable for one third of the rent though their separate signatures were affixed to the guaranty.

The result is that the exceptions must be overruled.

So ordered.

ABERTHAW CONSTRUCTION COMPANY *vs.* ERNEST L. RANSOME.

Suffolk. January 22, 1906. — June 21, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, & SHELDON, JJ.

Patent. Jurisdiction. Equity Jurisdiction. Slander of Title. Corporation. Equity Pleading and Practice.

Even if the patentee of his own invention is estopped to deny the validity of the patent as against the assignee of his rights, yet in a suit brought against him by his assignee for an alleged infringement he always can show the previous state of the art to which his invention relates as bearing upon the construction and scope of the patent and to show that the alleged acts are not violations.

A suit for the infringement of a patent which involves an inquiry into its scope and nature is within the exclusive jurisdiction of the federal courts.

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A bill in equity founded on the violation of a contract cannot be maintained where the sole defendant is not a party to the contract and the party to the contract other than the plaintiff is not a party to the bill.

A bill in equity cannot be maintained on the ground of alleged slander of the plaintiff's title for false representations as to the character and quality of the plaintiff's property or as to his title thereto which involve no breach of trust or contract.

A bill in equity against an individual defendant founded on a breach of contract by a corporation cannot be maintained upon allegations that the defendant owns a large amount of the capital stock of the corporation, that he is "the dominant factor therein" and controls and dictates its policy, without alleging that he is the owner of all of the capital stock or even of a majority of it.

A bill in equity founded on a breach of contract by a corporation cannot be maintained against a stockholder of the corporation alleged to control and dictate its policy without making the corporation a party.

HAMMOND, J. This case is before us by a reservation upon the bill and demurrer. The material allegations of the bill may be summarized as follows:

The respondent is the inventor and patentee of a "new and useful building material of concrete or similar substance and cold twisted metal bars embedded therein combined." In February, 1896, he assigned one half interest in the letters patent to one Smith, and subsequently he and Smith each assigned his interest to the Ransome and Smith Company, a California corporation, so that the latter became the sole holder of the patent. In March, 1896, this company, subject to certain exceptions not here material, assigned to the plaintiff, "its assigns and legal representatives an exclusive right title and ownership to said letters patent to make use and sell or practice the inventions the subject matter of" said letters patent "in and throughout the States of Maine, Massachusetts and Rhode Island," and subsequently, in the same month, made to the plaintiff a similar assignment as to the State of Connecticut. Both these assignments were executed by the Ransome and Smith Company by the defendant, its president.

In January, 1900, the Ransome Concrete Company, a New Jersey corporation, entered into a contract with the plaintiff which, after reciting that the said Aberthaw Construction Company was entitled to the rights under said letters patent in the States of Maine, Massachusetts, Rhode Island and Connecticut, and that the Ransome Concrete Company was the owner of the rights under said letters patent for various other

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territories in the United States, including Vermont and New Hampshire, but not including Maine, Massachusetts, Rhode Island and Connecticut, "granted to the Aberthaw Construction Company the exclusive rights to the use of the aforesaid letters patent in the States of Vermont and New Hampshire, and further provided that the said Ransome Concrete Company should aid the said Aberthaw Construction Company in every way possible in its power to extend its business, and would refer any and all opportunities presented to the said Ransome Concrete Company for construction under the 'Ransome' system in the aforesaid territory to said Aberthaw Construction Company, together with any information which might be helpful in obtaining such business."

Ransome at the time of the assignments by the Ransome and Smith Company owned a large amount of the capital stock of the company, and was and ever since has been "the dominant factor therein," and still controls and dictates its policy; and substantially the same allegations are made as to the relations between him and the Ransome Concrete Company and also between him and another corporation called the Ransome Concrete Machinery Company.

The plaintiff ever since the said assignments to it "has been the owner of the exclusive right to make, use and vend the material and invention covered by said letters patent within" the six New England States, and as such owner has carried on the business and derived great profits therefrom. These letters patent were acquiesced in by the inhabitants within the territory mentioned, and no infringement has taken place within that territory until the acts complained of.

Ransome, by various advertisements and otherwise, has interfered with the plaintiff's rights by representing that the Ransome Concrete Machinery Company is ready to sell "Ransome's Improved Twisted Steel," "in all sizes and lengths at short notice"; and also by representing to parties desiring the patented material that the patent is invalid and worthless. In this and other ways he has induced parties (several instances being specifically set forth in the bill) to buy of the Ransome Concrete Machinery Company, and to use in said States "said material covered by said letters patent."

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The bill further alleges that Ransome has done the acts complained of in pursuance of a fraudulent design to defraud the plaintiff "out of the profits of that which he had himself sold or caused to be sold to the" plaintiff; and that by reason of such acts and doings the plaintiff's "legitimate monopoly under said patent is being broken in upon and destroyed"; that Ransome "is causing to spread throughout . . . [New England] . . . the belief that the patent . . . is invalid, and that any one may make, use and sell said patented invention with impunity, and that the . . . [plaintiff] . . . will be powerless to prevent them"; all to the great damage of the plaintiff. It is further alleged that "at the date of the conveyances set out in . . . [the bill] . . . and also at the time of the acts complained of, and also at the time of bringing" the bill, Ransome was an officer, director and agent of the Ransome and Smith Company, Ransome Concrete Machinery Company, and the Ransome Concrete Company.

By an amendment to the bill it is further alleged that Ransome caused the Ransome and Smith Company to participate in all the acts complained of, and further that in two separate instances therein particularly set forth, one in Massachusetts and the other in Connecticut, he caused the last named company to interfere with the plaintiff's business; in the Massachusetts case by furnishing to certain persons "cold twisted steel" and superintendence in combining this steel with concrete, "which combination is the subject matter of this patent"; and in the Connecticut case by bidding for the sale of such steel with the intention of competing with the plaintiff, whereby the plaintiff had to sell to the party desiring the steel at a less price than it otherwise could have obtained.

The bill further alleges that in these and many other ways the defendant has done or caused to be done many things tending to defeat his own grant to the plaintiff; and it alleges that it is against equity and good conscience "for . . . said . . . Ransome, being the inventor, assignor and dominant power in the assigning and competing companies, as aforesaid, and being a dominant factor in the Ransome Concrete Company, which has contracted to aid . . . [the plaintiff] . . . in securing business under said patent and otherwise, to endeavor by means

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of advertisements, slander of title, assurances, bonds of indemnity, personal services, and competition in general, to divert into his own pocket the profits which would naturally go to the . . . [plaintiff] . . ., and to render worthless said letters patent sold by him and now owned by the" plaintiff. It is further alleged on belief that the defendant intends to continue his unlawful acts as aforesaid within the New England States.

The prayers are for an injunction restraining the defendant "his agents, servants and attorneys, . . . from advertising, or causing it to be advertised, that he or any of the companies aforesaid can or will within the . . . [New England States] . . . make or cause to be made, use or cause to be used, sell or cause to be sold, the aforesaid material covered by said patent"; and also that the defendant be enjoined "from personally competing with the . . . [plaintiff] . . . in the manufacture, use and sale of said patented material within the . . . [New England States] . . ., and from causing the companies dominated by him from competing as aforesaid"; and further, that the defendant, "his agents, servants and attorneys, . . . be strictly enjoined from representing, assuring or hinting to any person or corporation that said patent is invalid, doubtful or uncertain, and from stating to any such persons or corporations reasons or facts leading to that conclusion." There is also a prayer for the assessment of damages, and one for general relief.

In other words, the bill charges the defendant with interfering with the patent rights of the plaintiff by competing with the plaintiff and slandering its title, and the prayer is that the defendant may be enjoined from such acts.

The defendant demurs because, first, the bill shows no case for equitable relief; second, there is a plain, complete and adequate remedy at law; third, the bill is multifarious; fourth, because the acts were the acts of corporations and it does not appear that the defendant is an agent or officer of any of the corporations, or that the acts are acts for which the defendant is responsible; fifth, it is a suit arising under the patent or copyright laws of the United States and the State court has no jurisdiction; and sixth, the corporations are not made parties.

1. As to the alleged acts of infringement. Even if it be

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assumed that inasmuch as the defendant is the inventor and patentee, he is estopped, as against the plaintiff whose rights come from him by mesne assignments, to deny the validity of the patent, (*Chambers* v. *Crichley*, 33 Beav. 374; Robinson on Patents, §§ 767, 787; see also cases cited in 22 Am. & Eng. Encyc. of Law, 2d ed. 429,) still it is open to the defendant to show the previous state of the art as bearing upon the construction and scope of the patent, and to show that the acts alleged are not violations. *Babcock* v. *Clarkson*, 63 Fed. Rep. 607. Moreover, a suit for an infringement, whether brought against the original patentee or any other party involves an inquiry into the scope and nature of the patent. Over such a suit the federal courts have exclusive jurisdiction. U. S. Rev. Sts. (2d ed.) § 711, cl. 5. See also cases cited in 22 Am. & Eng. Encyc. of Law (2d ed.) 479, 480. *Dudley* v. *Mayhew*, 3 Comst. 9.

Nor can the bill be maintained as a violation of the contract between the plaintiff and the Ransome Concrete Company. The defendant was not a party to that contract.

2. As to the alleged slander of title. The jurisdiction of equity does not extend to false representations as to character and quality of the plaintiff's property nor as to his title thereto which involve no breach of trust or contract. Hence the bill cannot be sustained upon the ground of the alleged slander of title. *Boston Diatite Co.* v. *Florence Manuf. Co.* 114 Mass. 69.

3. It is alleged that the defendant is the dominant factor of various corporations named in the bill, and therefore can be held answerable for their acts. So far as those acts however are alleged to be infringements of the patent, we have no jurisdiction, as above stated. So far as such acts are in violation of contracts, to reach the defendant it is necessary to disregard the entity of the corporation and treat the defendant as the real party in all these transactions. It is not alleged that the defendant was the owner of all the capital stock in all of these companies or any one of them, nor is it even alleged that he owned a majority of the stock in any one of them. The bill is in effect an attempt to control the action of these corporations by control over an influential owner of the stock. Justice requires that the corporations whose interests are involved should be made

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parties. The bill is of vital interest to the other stockholders. *Price* v. *Minot*, 107 Mass. 49, 63.

Bill dismissed with costs.

W. A. Rollins, for the plaintiff.

G. R. Nutter, for the defendant.

WILLIAM H. TEASDALE & others *vs.* NEWELL AND SNOWLING CONSTRUCTION COMPANY.

Norfolk. January 23, 1906. — June 21, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, & SHELDON, JJ.

Equity Pleading and Practice. Stable. License. Metropolitan Park Commission. Board of Health. Statute.

On an appeal from a decree dismissing a bill in equity which does not state the ground of the decision, the burden is on the plaintiff to show that on the facts which appear a decree in his favor was necessary.

On an appeal from a decree in equity where substantially all of the evidence was oral the findings of the judge who heard the case will not be disturbed unless plainly wrong.

R. L. c. 102, § 69, providing that "no person shall erect, occupy or use for a stable any building in a city whose population exceeds twenty-five thousand unless such use is licensed by the board of health of said city" does not apply to a stable placed temporarily on land taken for a reservation by the metropolitan park commissioners for the use of a contractor employed by the commissioners in the preparation of the land for a park, which is reasonably necessary for the prosecution of that work and was erected under a vote of the commissioners and by their sanction.

The general statute R. L. c. 102, § 69, requiring in cities of a certain population a license from the board of health before a stable can be erected, must be held to be subordinate to the special statute St. 1893, c. 407, § 4, which authorizes the metropolitan park commissioners to "do all acts needful for the proper execution of the powers and duties granted to and imposed upon" them as agents of the Commonwealth.

BILL IN EQUITY, filed November 3, 1905, by the members of the board of health of the city of Quincy, to restrain the defendant from maintaining a certain stable without a license under R. L. c. 102, §§ 69, 71.

The defendant in its answer alleged that it had made a contract with the metropolitan park commissioners to do the

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grading and other work upon certain lands in Quincy which the commissioners had taken for park purposes under the provisions of St. 1893, c. 407, and St. 1895, c. 450: that in order to carry out the defendant's contract it was necessary to provide stable accommodation for a large number of horses in the immediate vicinity of the work; that the defendant, being unable to find adequate stable room for its horses in the vicinity, applied to the plaintiffs for a license to erect and use a stable on land in Quincy which had not been taken as part of the reservation by the commissioners, and that the application was refused; that on October 11, 1905, the defendant received permission and authority from the metropolitan park commission to erect a stable upon a part of the land taken for a reservation; that the defendant proceeded to erect there a structure to be used as a stable during the construction work under its contract and to be removed at the completion of its contract; and that the erection and use of this stable was incidental and necessary to the improvement of the reservation.

In the Superior Court the case was heard by *Fessenden*, J. He appointed a commissioner under Chancery Rule 35 to take the evidence to be reported to this court, and made a final decree that the bill be dismissed. The plaintiffs appealed. The character of the evidence is indicated sufficiently in the opinion.

A. E. Pillsbury, (*G. E. Adams* with him,) for the plaintiffs.

S. C. Brackett, for the defendant.

HAMMOND, J. Inasmuch as the ground on which the bill was dismissed is not mentioned, the plaintiffs have the burden of maintaining that upon the facts which appear they have a right to a decree in their favor. *Donovan* v. *McCarty*, 155 Mass. 548. Moreover, since the evidence at the hearing was substantially all oral, the findings of the trial judge will not be disturbed unless plainly wrong. *Dickinson* v. *Todd*, 172 Mass. 183.

We have examined the evidence, and in view of the locality of the work, the number of horses employed, the attempts made by the respondent to secure stable room, the action of the board of health upon the petition made to them and the apparent attitude of the board upon the whole question of stable room, the propriety of doing the work with horses and the saving thus

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made in expense when compared with other methods of doing the work, a reasonable and proper view which the trial judge could have taken of the evidence was that the method adopted and carried out to procure stable room was reasonably necessary for the prosecution of the work. At least such a view of the evidence could not be set aside as clearly wrong, and it is to be presumed in support of the decree that the trial judge took that view. In the same manner it is to be presumed that the park commissioners considered it reasonably necessary that the stable should be erected upon the park land during the work to be done under the contract, and that under a vote of the board it was erected upon a spot selected by the engineer, and that this act was sanctioned by the commissioners.

Here then is a case where the commissioners have made a contract for the proper preparation of land taken for park purposes, and it is reasonably necessary to the performance of that contract that a stable should be placed temporarily upon the unfinished park, and such a stable has been erected under a vote of the commissioners and by their sanction.

R. L. c. 102, § 69, reads thus: "No person shall erect, occupy or use for a stable any building in a city whose population exceeds twenty-five thousand unless such use is licensed by the board of health of said city, and, in such case, only to the extent so licensed." Quincy, within whose limits the stable stands, is a city of more than twenty-five thousand inhabitants, and the erection and use of the stable has not been licensed by the board of health of that city.

The question is whether the section above quoted is applicable to this stable. The statutes under which the metropolitan park commissioners act contain elaborate provision for the establishment of parks or "open spaces for exercise and recreation." St. 1893, c. 407. St. 1894, cc. 288, 483. The commissioners are authorized to acquire, by right of eminent domain or otherwise, and to "maintain and make available," such open spaces for such purposes, to take charge of the same, to make rules and regulations for the government and use of the same, and further, in general to "do all acts needful for the proper execution of the powers and duties granted to and imposed upon" them. St. 1893, c. 407, § 4. In a word, these parks are placed

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under the control of these commissioners acting as the agents of the State in exercising the authority of the sovereign over its own property. As such agents, performing the duty of making available for park purposes the land in question, it is found reasonably necessary for them to erect upon it and use this stable. Such an act must be regarded as needful in the proper execution of the powers which the State may exercise over its own property; and the general law made for the regulation of citizens must be held subordinate to this special statute regulating the use of the property of the State unless there is express provision to the contrary. It is not to be presumed that the Legislature intended to give to the local licensing board the authority to thwart the reasonably necessary efforts of the park commissioners to perform their duty as agents of the State.

Decree affirmed.

FREDERICK D. ROBBINS, administrator, *vs.* DOMINICK HORGAN & others.

Middlesex. January 23, 24, 1906. — June 21, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, & SHELDON, JJ.

Agency. Executor and Administrator. Power of Attorney.

Where a power of attorney gives to two persons named a bare authority to receive money from a fund to be distributed, they not being partners in business and having no interest in the fund, neither of them alone has authority to receive the money without the consent of the other.

A power of attorney from the next of kin in a foreign country of one who died in this Commonwealth authorizing the payment of their shares of the estate of the deceased to two persons named as attorneys, one being a resident in this Commonwealth and the other a United States consul in the foreign country, does not give authority to the attorney in this Commonwealth to receive payments without the consent of his co-attorney; and if the administrator of the estate of the deceased pays the amounts of the shares of the principals to the attorney in this country without the knowledge or consent of his co-attorney in the foreign country, and the attorney to whom the payments are made absconds with the money, such payments will be disallowed in the accounts of the administrator and he will be held liable to the principals to make good their loss. If the attorney to whom the money was paid appeared in behalf of the principals to consent to the appointment of the administrator this does not increase his authority to receive the money.

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APPEAL, by the administrator of the estate of Joseph H. Horgan, from a decree of the Probate Court disallowing certain payments made by him to or under the order of one George A. Smythe and charging the administrator with such amounts with interest. The respondents were the heirs at law and next of kin of Horgan, all living in Ireland.

The case was heard by *Morton*, J., who made the following memorandum of decision:

"The appellant, Robbins, was duly appointed administrator of the estate and duly qualified by giving bonds as such. Thereupon he became bound to administer the estate according to law and to distribute the proceeds, if any, amongst those entitled to the estate. The fact that his appointment was procured by Smythe and that he was in Smythe's office and acting under his direction did not release him from the obligations imposed upon him by law and by his bond. The estate amounted to about $11,000 and there are six heirs living in Ireland. There were some debts due from the testator and there have been of course some expenses incurred in the settlement of the estate. But it is not denied that there was a large surplus for distribution amongst the next of kin. They have never received any of it.

"The administrator's defence and excuse is that he has paid it over to Smythe as attorney for the heirs or next of kin and that Smythe appropriated it and absconded. The defence being payment, the burden is on the administrator. To establish Smythe's right to receive the money and to justify himself in paying it over, the administrator relies upon a power of attorney from five of the heirs to Smythe and one Lucien J. Walker, the United States consul at Queenstown. The power of attorney was a joint one. It was drawn in Smythe's office and sent by him to Walker. As originally drawn, the names of the principals were left blank and Smythe's name was inserted as the sole agent or attorney. This was the condition in which it was when received by Walker. Under Walker's direction, the names of five of the heirs were inserted as the principals with their residence and his own name was inserted as attorney in addition to that of Smythe and the instrument altered throughout to correspond with those changes, and the month and the day of the month

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were inserted. In this condition it was executed by the five heirs. The other heir, Ellen Horgan, never executed it and never authorized Walker or Smythe to collect or receive her share of the estate. Walker's name was inserted in the power of attorney because of doubts entertained by Walker and his secretary Mr. Piatt as to the financial responsibility of Smythe.

"When completed the power of attorney was forwarded by Walker to Smythe and was duly received by him and the contents were known to Robbins. Upon the receipt of the power of attorney, Smythe caused a petition praying for the appointment of Robbins as administrator to be presented to the Probate Court. This was signed by the five heirs by Smythe as their attorney. As already stated Robbins was duly appointed and gave bond as required and duly returned an inventory of the estate. He reduced the estate to possession and within a short time, by Smythe's direction, transferred and paid over to him substantially the whole of it. This was done without any knowledge on the part of Walker of what was transpiring and without any authority from him to the administrator to make such payments or to Smythe to receive them. Walker supposed, if that is competent and material, that Smythe would attend to such legal matters as required to be attended to here, but that any money that might be collected or realized would be sent to him for distribution among the heirs.

"Assuming that under the power of attorney to himself and Walker Smythe would have authority to attend to all such legal matters as pertain to the settlement of the estate here, nevertheless I do not think that the administrator was justified in paying over or transferring to Smythe the funds and property of the estate without authority from Walker to Smythe or himself.

"Walker now says that Smythe had no such authority and I find as a fact that he had not, and that the administrator had no authority from Walker to pay over or transfer to Smythe the funds or property of the estate. I think that in the absence of such authority he was not warranted, the power of attorney being a joint power, in paying over or transferring the funds and property of the estate to Smythe as he did. The heirs did not know of it and have done nothing to ratify or approve of what the administrator has done.

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"I do not find that the administrator profited personally by Smythe's wrongdoing, but it is almost inconceivable that he should not have been put upon inquiry as to the use which Smythe was making of the funds and property transferred to him."

The remainder of the memorandum of decision related to certain items in the accounts of the petitioner, in regard to which the respondents had taken an appeal and which were allowed by the justice.

The petitioner contended at the hearing, and asked the justice to rule, that Smythe, as one of the attorneys named in the power of attorney, had, by virtue thereof, authority to receive payment of any and all sums belonging to the heirs who signed the power of attorney.

The justice refused to rule as requested, and upon all the evidence in the case found for the respondents, and ordered that a decree be entered modifying the account as stated in the memorandum of decision, directing that if the parties could not agree the case should be sent to an auditor to state the amount. The petitioner alleged exceptions.

S. H. Tyng, (*T. J. Kenney* with him,) for the petitioner.

W. H. H. Tuttle, for the respondents.

HAMMOND, J. The crucial question is: Was the payment to Smythe the agent a payment to his principals? Smythe's only authority to receive the money was under the power of attorney. Under that power he was a joint agent with Walker. They were private agents as distinguished from public agents. They were not partners in business, nor did they have any interest in the fund to which their principals were entitled. They were mere agents having only a bare authority, and both constituted one agent and neither was a complete agent by himself. In the language of Coke they "had but a mere and bare authority and they both [did] in law make but one attorney." Co. Lit. 49 b. The powers of the agency were conferred upon neither acting alone and without the consent of the other, but only upon both acting together. The logical result of such a situation is that the act of both, or at least the consent of both to the act of one, is essential to the valid exercise of any power of the agency; and such is the law. Co. Lit., *ubi supra*. *Towne*

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v. *Jaquith*, 6 Mass. 46. *Copeland* v. *Mercantile Ins. Co.* 6 Pick. 198. 2 Kent Com. 633, and cases cited. Story, Agency, (9th ed.) § 42, and cases therein cited. See also for collection of some of the authorities, 1 Am. & Eng. Encyc. of Law, (2d ed.) 1057.

The payments were made to Smythe alone. He appropriated the money to his own use and absconded. The justice found that the blank power as originally drawn by Smythe and sent to Walker, the United States consul at Queenstown, contained only the name of the former as the proposed agent, but that, before it was executed, Walker's name was inserted "because of doubts entertained by Walker and his secretary Piatt, as to the financial responsibility of Smythe." He further found that Walker had no knowledge that the payments were being made to Smythe; that he, Walker, "supposed . . . that Smythe would attend to such legal matters as required to be attended to here, but that any money that might be collected or realized would be sent to him for distribution amongst the heirs"; also that Walker never consented that Smythe should receive the money without authority from him, and never gave him any such authority and never gave to the administrator any authority to pay or to transfer to Smythe the property. The principals never have ratified personally the payment to Smythe. They never have ratified it by the act of their agents under the power, because only one of the joint agents has consented to it. The lack of the consent of the other is fatal to the validity of the act as an exercise of agency under the power.

It is urged by the accountant that under the circumstances of this case the fair interpretation of the power is that Smythe who resided here, where the money was, was to do all things here necessary and proper to collect and receive it, and that he was to send it to Walker in Ireland, where the principals resided, for the simple purpose of distribution. But we cannot so interpret the power. It was perfectly easy for the accountant to keep the money until he received the consent of both agents, or of the principals, as to what he should do with it. All the circumstances indicate that the principals never intended that Smythe alone should receive the money without at least the consent of Walker, so that the latter might be held accountable as

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though both had received it. They looked to Walker for safety, and not alone or chiefly to Smythe. There is nothing in the circumstances of this case to control the general principle.

Nor does the case come within certain commercial exceptions where the general rule has yielded for the benefit of trade, or to meet the supposed necessities in contracts made by one of several joint owners of ships, and in cases of sales made by one of two factors of goods consigned to them for sale. See *Hawley* v. *Keeler*, 53 N. Y. 114. The case is also clearly distinguishable from cases like *Heard* v. *Lodge*, 20 Pick. 53, upon which the accountant relies. Nor is the fact that Smythe appeared as attorney for the principals to consent to the appointment of the accountant as administrator of importance.

Exceptions overruled.

WILLIAM REARDON & others *vs.* EDMUND REARDON & others.

Middlesex. March 20, 1906. — June 21, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, BRALEY, & SHELDON, JJ.

Deed. Trust. Estoppel. Equity Jurisdiction, Laches.

One of two partners having acquired certain land in his own name executed a declaration of trust to the effect that he held the land in trust for his partner J. R. and himself, for the benefit of the firm until its dissolution, declaring that "the rest and residue, if any there be, shall be held by me or my heirs in trust one half for myself and my heirs and one half in trust for the said J. R. and his heirs as tenants in common, and at the request of any party interested the trust shall then cease and by proper conveyances the legal title shall then be made to stand one half in me and my heirs and one half in the said J. R. and his heirs as tenants in common." *Held*, that J. R. took an equitable estate in fee simple which he might devise.

In a suit in equity by persons claiming as heirs at law of J. R. for an accounting for rents and profits and for a conveyance of their alleged shares in certain land against a person who had held the legal title to the land for the benefit of himself and J. R., copartners in business, it appeared that J. R. had an equitable fee as a tenant in common of the land in question, which he devised to his wife, that the plaintiffs were legatees under the will of the widow of J. R. and agreed that the business in which her estate was invested should be carried on by the executors of her will and the defendant for the benefit of all the parties in interest, that the business was so carried on for eight years at the end of which time by agreement of all the parties a corporation was formed which took over the business, that the plaintiffs received shares of stock in the corporation in proportion

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to their interests under the will of the widow of J. R., that the interest of J. R. in the land in question was treated as part of the estate of the widow and was conveyed to the corporation with the other property of her estate, and that the plaintiffs gave receipts for the full payment of their legacies under the will of the widow. *Held*, that the plaintiffs were estopped to assert a claim to any interest in the land as heirs at law of J. R.

A bill in equity by the heirs at law of a person who died twenty years before the filing of the bill, claiming certain land as against the widow and sole devisee of the deceased and those claiming under her who have been in open enjoyment of the land during the whole of that period under a claim of right, is barred by laches.

LATHROP, J. This is a bill in equity, filed in the Superior Court on October 11, 1904, by William Reardon against Edmund Reardon. Subsequently Margaret Baker and Mary T. Reardon were joined as parties plaintiff, and other persons were joined as parties defendant. All of the plaintiffs are heirs at law of John Reardon, as are some of the defendants. The case was heard in the Superior Court, and the bill was dismissed with costs. It comes before us on appeal with a full report of the evidence. The judge made no findings of fact and made no rulings of law. The case presented may, we think, fairly be stated thus:

In 1863, Edmund Reardon entered into partnership with his father, John Reardon. On September 22, 1873, there was conveyed to John N. Merriam and Edmund Reardon a parcel of land in Cambridge. On May 14, 1877, Merriam conveyed his undivided half of the parcel to Edmund Reardon. On November 21, 1878, Edmund Reardon executed a declaration of trust to the effect that he held the land in trust for John Reardon and himself as copartners, for the benefit of the firm until its dissolution, "and the rest and residue, if any there be, shall be held by me or my heirs in trust one half for myself and my heirs, and one half in trust for the said John Reardon and his heirs as tenants in common, and at the request of any party interested the trust shall then cease and by proper conveyances the legal title shall then be made to stand one half in me and my heirs and one half in the said John Reardon and his heirs as tenants in common."

The firm continued until 1884, when John Reardon died. By his will he bequeathed and devised all his estate real, personal and mixed to his wife Mary Reardon, with the exception of $1 to each of his six children.

After the death of John Reardon, Mary Reardon continued

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the business of the firm as copartner with Edmund Reardon until her death in 1890. By her will she left specific bequests to the several heirs at law of John Reardon. The legatees under the will of Mary Reardon agreed that it would be more advantageous to continue the business of the firm as it existed at the time of her death, than to receive their shares under her will at that time. The business was therefore carried on by Edmund Reardon and the executors of the will of Mary Reardon for the benefit of all parties in interest until 1898, when the parties agreed to form a corporation to take over the assets of the firm, the parties to receive shares of stock in the proposed corporation in proportion to their interest under the will of Mary Reardon. The corporation was accordingly formed, the business taken over, and the parcel of land held in trust by Edmund Reardon was conveyed to the corporation.

It also appears that the parties to this cause received the number of shares proportional to their respective interests under the will of Mary Reardon, and gave receipts for the full payment of their legacies under the will.

The contention of the plaintiffs is that under the declaration of trust executed by Edmund Reardon in 1878 they are tenants in common of the parcel of land therein described as heirs at law of John Reardon, and are entitled to an accounting of the rents or profits thereof and to a conveyance of their shares of that parcel of land.

As to Margaret Baker, one of the plaintiffs, it appears that in 1895 she conveyed to the children of John Reardon all her interest in any real estate which she had as an heir at law of John Reardon or of Mary Reardon.

The contention of the defendants is that under the declaration of trust John Reardon had an equitable fee as a tenant in common with Edmund Reardon in the parcel of land; that by the will of John Reardon his interest passed to his wife; that Mary Reardon had the right to dispose of this interest; that the plaintiffs, having received and acknowledged satisfaction of the full amount of their legacies under the will of Mary Reardon and having received stock in the corporation, are estopped to maintain the bill, and that the judge of the court below may have found properly that the plaintiffs are barred by their laches.

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We are of opinion that the defendants are correct in their statement that John Reardon had an equitable fee which he could devise. *Newhall* v. *Wheeler*, 7 Mass. 189. *Holland* v. *Cruft*, 3 Gray, 162, 175. *Knowlden* v. *Leavitt*, 121 Mass. 307. The interest of John Reardon having passed to Mary Reardon, the plaintiffs have no claim upon it as heirs of John Reardon.

Nor have we any doubt that the bill might have been rightly dismissed upon the ground of estoppel, or of laches on the part of the plaintiffs. *Snow* v. *Boston Blank Book Manuf. Co.* 158 Mass. 325. *Treadwell* v. *Treadwell*, 176 Mass. 554.

Decree affirmed.

G. A. Perkins, for the plaintiffs.

G. F. Ordway, for the defendants, was not called upon.

ARTEMAS H. HOLMES, executor & trustee, *vs.* EVELYN M. DALLEY, trustee, & others.

Suffolk. March 23, 1906. — June 21, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, BRALEY, & SHELDON, JJ.

Trust, Precatory. *Devise and Legacy. Words*, "Wish and desire."

A will creating a trust, after providing for paying one half of the net income of the trust fund to the widow of the testator during her life, contained the following provision: "After the decease of my said wife, one half of the principal of said trust estate is to be paid over and conveyed to such person or persons, and in such proportions as my said wife shall by will appoint, but it is my wish and desire that if my wife has received from my daughter and her family the affection and respect, to which she is entitled, that she then will appoint said share of said trust estate to my daughter and her children, in such way and manner, and in such proportions, as to her may seem best — but in case my said wife shall die without making any appointment of her share of said trust estate, then the same shall be added to the share held in trust for my daughter and her children and be held upon the same trusts." The widow exercised the testamentary power by appointing her share of the fund to persons other than the daughter of her husband and the children of such daughter, and declaring that since the death of her husband she had not received from his daughter and her family the affection and respect to which she was entitled. *Held*, that the words "wish and desire" did not create a precatory trust, and therefore that the question of fact whether the appointing testatrix had received from her husband's daughter and her family the affection and respect to which she was entitled was immaterial.

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LATHROP, J. This is a bill in equity by the sole executor of and trustee under the will of Angie N. Allen against Evelyn Maynard Dalley, wife of Henry Dalley, as she is the sole trustee under the will of Aaron Hall Allen, and against her children, and against Evelyn Maynard Dalley in her own right. The bill prays for a decree against Mrs. Dalley as trustee that she be ordered to pay over one half of the trust fund under the will of Aaron Hall Allen.

Aaron Hall Allen died on June 23, 1889, leaving his wife Angie N. Allen surviving him. By the first article of his will, which was duly admitted to probate in Suffolk County in September, 1889, he first devises to his wife Angie N. Allen in fee his residence in Boston. By the second article he devises to his daughter Evelyn Maynard Dalley an estate in Brooklyn, New York, for life, with remainder to her children. By the third article he bequeaths to trustees all the residue of his estate real and personal for the following uses and purposes:

1. To apply the proceeds of the sale of the personal property to the payment of the mortgage on the estate devised to his wife; and if there should be any of the proceeds of the personal property remaining, after the payment of the above mentioned mortgage, then to apply the remainder to the payment of the mortgage, "as far as may be," to the payment of the mortgage on the house bequeathed to the daughter, and if any of the proceeds of the personal property are left then to apply the same to the payment of any of the mortgages on the testator's other real estate.

The trustees are then directed to receive and collect the rents, profits and income of his real estate, and the proceeds, if any, of the real estate which the trustees might sell, and after deducting expenses, etc., to pay certain annuities. Then follow these clauses:

"3. To pay one half the remainder of the net income of said trust estate, to my wife Angie N. Allen, during her natural life — and to pay one fourth thereof to my daughter Evelyn Maynard Dalley, during her natural life — The remaining one fourth part of said net income, is to be applied by my said trustees, to the payment of the mortgages and incumbrances on the real estate held by them in trust, in such manner as they think best, until

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all said mortgages and encumbrances are paid off and satisfied, and the said trust estate is free and clear therefrom = and then said one fourth is to be paid to my daughter during her life —

"4 Fourth — After the decease of my said wife, one half of the principal of said trust estate is to be paid over and conveyed to such person or persons, and in such proportions as my said wife shall by will appoint, but it is my wish and desire that if my wife has received from my daughter and her family the affection and respect, to which she is entitled, that she then will appoint said share of said trust estate to my daughter and her children, in such way and manner, and in such proportions, as to her may seem best — but in case my said wife shall die without making any appointment of her share of said trust estate, then the same shall be added to the share held in trust for my daughter and her children and be held upon the same trusts —

"5 Fifth — After the decease of my daughter, the remaining one half of said trust estate, and in case of the death of my wife without making any appointment as provided in the preceding paragraph, then the whole of the principal of said trust estate, shall be divided equally among the children of my said daughter, the issue of any deceased child to take its parents share by right of representation — "

Angie N. Allen died on March 14, 1904, leaving a will and codicil, which were duly admitted to probate. The tenth article of her will reads as follows: "All the rest, residue and remainder of my estate, both real and personal, including my share of the principal of the trust fund established by the will of my late husband, Aaron Hall Allen, proved and allowed in the Probate Court for Suffolk County, September, 1889, over which by the provisions of said will I have the right and power of appointment, I do hereby give, devise and bequeath and in exercise of said power of appointment hereby appoint to my executors and trustees hereinafter named and the survivor of them and their successor or successors, in trust for the following uses and purposes." Then follow various legacies.

In the fifteenth article of her will she disposes of the rest and residue of her property to the plaintiff, who was her son in law, and of the trust property left her under her husband's will. She also asserts that she has not received from her hus-

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band's daughter and her family the affection and respect to which she was entitled, and has therefore exercised her power of appointment.

The eighth paragraph of each of the answers alleges that Angie N. Allen at all times received the affection and respect to which she was entitled. It also charges collusion between the plaintiff and Angie N. Allen, in drawing the will so as to make it appear that she was acting in accordance with the power.

The case was reserved by a single justice of this court for our consideration, "on the terms that if the matters alleged in the eighth paragraph of the answers are competent as a defence to the plaintiff's bill, the plaintiff shall be at liberty to file a replication and the cause shall stand for trial; otherwise, a decree is to be entered for the plaintiff."

The real question in the case is whether the words "wish and desire" in the fourth clause of the will of Mr. Allen create what is commonly called a precatory trust, or whether they are merely an expression of the hope and belief of the testator.

We are of opinion that, taking the will as a whole, it was the intention of the testator to keep the trust fund together, paying over to his widow one half of the net income during her life, and that on her death one half of the principal was to be paid as she should appoint. We are further of opinion that the words "wish and desire" do not constitute a trust, but are merely an expression of a hope on the part of the testator. The question of fact sought to be raised by the defendants therefore becomes immaterial; and according to the terms of the report the plaintiff is entitled to judgment. The case in our opinion rests upon *Aldrich* v. *Aldrich*, 172 Mass. 101, and cases cited. See also *Lloyd* v. *Lloyd*, 173 Mass. 97. The case of *McCurdy* v. *McCallum*, 186 Mass. 464, relied on by the defendants, was decided on what was found to be the law of Nova Scotia, and was not based upon the decisions in this Commonwealth.

Decree for the plaintiff.

W. W. Vaughan, (*S. F. Batchelder* with him,) for the plaintiff.

J. L. Thorndike, (*E. R. Thayer* with him,) for the defendants.

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REVERE WATER COMPANY *vs.* INHABITANTS OF WINTHROP. INHABITANTS OF WINTHROP *vs.* REVERE WATER COMPANY & others.

Suffolk. March 28, 29, 1906. — June 21, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, BRALEY, & SHELDON, JJ.

Municipal Corporations. Conspiracy. Fraud. Waterworks. Equity Jurisdiction, To remove cloud on title, Specific performance. *Statute. Constitutional Law. Contract. Revere Water Company. Winthrop. Words,* "Ratified."

Where the selectmen of a town called a town meeting to act on a proposition to purchase the plant of a water company at a certain price and before the meeting but after they had issued the warrant for the meeting voted to purchase the plant at the price named, but they had not stated in the warrant for the meeting their intended vote to purchase the plant and did not disclose their vote to the community before the meeting, this failure to give the information, although it may have been ill advised and an error of judgment, is not evidence of corruption to support a charge of conspiracy unless there is proof to connect it with fraudulent conduct or an unlawful purpose.

Under R. L. c. 25, § 31, a vote of a town to purchase the plant and privileges of a water company for the purpose of supplying its inhabitants with water is of no effect unless preceded by a vote of the selectmen authorizing the purchase.

Under R. L. c. 25, § 31, a vote by a majority of the voters of a town can have no effect in ratifying a vote of its selectmen to purchase the plant and privileges of a water company for the purpose of supplying the inhabitants of the town with water unless the selectmen voted to make the purchase before the warrant for the meeting was issued and their action was stated in the warrant.

Where a vote of a town to purchase the plant and privileges of a water company for the purpose of supplying the inhabitants of the town with water is void under R. L. c. 25, § 31, because when the warrant for the meeting at which the vote was passed was issued the selectmen of the town had not voted to make the purchase and no action on their part was stated in the warrant, if thereafter the water company gives notice of its acceptance of the vote passed at the meeting, and a deed is delivered in pursuance of the vote and a semblance of taking possession of the works by the town occurs, these acts impose no obligation on the town to accept or pay for the works under the terms of the vote, especially where the town by another vote less than three months later expressly rejects the attempted purchase; and, if the deed has been recorded and the town has acquired a right to the conveyance of the plant and privileges under an agreement made according to a subsequent statute, it is entitled in equity to a decree of cancellation to remove the cloud upon its title.

St. 1882, c. 142, incorporating the Revere Water Company and St. 1884, c. 259, authorizing it to supply the town of Winthrop with water, which were enacted subject to Pub. Sts. c. 105, § 3, gave to that corporation no vested rights inconsistent with a subsequent grant by the Legislature to the town of Winthrop to

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construct, operate and maintain a water supply system and furnish itself and its inhabitants with water.

St. 1905, c. 477, § 12, gave the Revere Water Company, which was incorporated by St. 1882, c. 142, and was authorized by St. 1884, c. 259, to supply the town of Winthrop with water, the right, on a notice within thirty days of the acceptance of the act by that town, to sell to the town all its property therein used for supplying the town or its inhabitants with water at a fair value to be ascertained as provided in § 13 of the act, authorized such purchase by the town to be voted for at a town meeting, and provided that the town should not construct a distributing system for supplying water to its inhabitants under the authority of the act unless it first should have purchased the property which the company had notified the town that it desired to sell, and provided further that in case the company failed to perform all the terms set forth in the section, the town might proceed to construct, operate and maintain a water supply system and furnish itself and its inhabitants with water under the terms of the act. *Held*, that the statute was not an appropriation of private property for a public use without due process of law under the fourteenth amendment of the Constitution of the United States.

St. 1905, c. 477, § 12, gave the Revere Water Company, which was authorized to supply the town of Winthrop and its inhabitants with water, the right on a notice within thirty days of the acceptance of the act by that town to sell to the town all its property therein at a fair value to be ascertained as provided in § 13 of the act, authorized such purchase by the town to be voted for by ballot at a special or an annual town meeting, and provided that if the town should vote to purchase the property after notice given by the company, the company should within thirty days after the vote execute and deliver to the town proper deeds and writings conveying the property to the town. The town accepted the act, and the company within thirty days thereafter gave the notice of its desire to sell its property to the town. At a meeting held about two months after its acceptance of the act the town rejected the company's offer to sell the property, but two months later at another meeting voted to accept the offer and purchase the property. The company failed to deliver a deed of the property either within thirty days of the last named vote or at any time thereafter. The town brought a suit in equity against the company to compel the specific performance of the contract under the statute by a conveyance of the property. *Held*, that a contract of sale existed under the terms of the statute; that the rejection of the company's offer at the first town meeting after it was made did not exhaust the right of the town to vote upon the proposition of purchase, and that the vote of acceptance at the second meeting was within a reasonable time; that the failure to deliver a deed within thirty days after the vote to purchase, as required by the statute, did not lessen the obligation of the company to deliver such a deed after the thirty days had expired, and that the town was entitled to a decree for the specific performance of the contract.

TWO BILLS IN EQUITY, one filed on November 20, 1905, by the Revere Water Company, incorporated under St. 1882, c. 142, and authorized by St. 1884, c. 259, to supply the town of Winthrop with water, against that town to compel the specific enforcement of an alleged contract to buy the plant and privileges

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of the plaintiff in Winthrop for the sum of $250,000, and to enjoin the town of Winthrop from purchasing the plant and privileges under St. 1905, c. 477, § 12, on the ground that the provisions of that section are unconstitutional; and the other, filed as amended on January 18, 1906, by the inhabitants of the town of Winthrop against the Revere Water Company and certain individual defendants, praying for the cancellation of a deed of November 20, 1905, recorded in the registry of deeds but alleged not to have been accepted by the plaintiff and to be void, which attempted to carry out the contract, set forth by the water company in its bill, for the sale of its plant and privileges to the town for $250,000; and praying also for a sale and conveyance of the property in question to the town under St. 1905, c. 477, § 12, or in the alternative for a sale to the town under a previous contract of July 22, 1884; for the appointment of a receiver; for injunctions against the individual defendants and an order that they pay the costs of suit; and for further relief.

The first bill was filed in the Superior Court and afterwards was removed from that court and entered in the Supreme Judicial Court. The second bill was filed in the Supreme Judicial Court. By an order of court the cases were consolidated and were heard together by *Braley*, J., who made certain findings of fact and a memorandum of decision. He made a decree dismissing the second bill as to all the individual defendants and allowing them severally their taxable costs. The town appealed from the decree. At the request of the parties the justice reserved the cases upon the pleadings, the evidence and the findings of fact so far as applicable for determination by the full court, such decree to be entered as the full court might determine.

C. F. Choate, Jr., (*J. D. Colt* with him,) for the town of Winthrop.

J. R. Dunbar, for the individual defendants.

A. E. Pillsbury, (*G. M. Palmer* with him,) for the Revere Water Company.

BRALEY, J. The town having considered it advisable to join as defendants several of its citizens, who when acting as members either of a municipal committee or of its boards of selectmen participated in the negotiations, legislative proceedings and

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an alleged contract of sale, all of which related to the acquisition by purchase of the company's water plant, their liability should be determined first. They severally as public officers are charged with an abuse of their trust by entering into a conspiracy with the manager of the company to foist this plant upon the town at a price greatly in excess of its intrinsic value. If thereby pecuniary loss resulted, such conduct, if proved, would render them liable in damages, or to the costs of any litigation in which the town became involved by their corrupt action, as they were bound to act in good faith for the interest of their principal, and to buy at the lowest price for which the property could be purchased. *Boston* v. *Simmons*, 150 Mass. 461. *Alvord* v. *Cook*, 174 Mass. 120, 127. *Emmons* v. *Alvord*, 177 Mass. 466. *Byrne* v. *Norcott*, 13 Beav. 336, 346. Notwithstanding the redundant verbal setting found in the bill, to sustain this charge the evidence must show a corrupt combination either to do an unlawful act or to accomplish a lawful act by unlawful means. *O'Callaghan* v. *Cronan*, 121 Mass. 114, 115. A full examination of the testimony, while it reveals the existence of a great diversity of opinion among the citizens, who finally became divided into two factions, one favoring the purchase at the price fixed by an hydraulic expert employed by the committee and the other opposing such purchase, with the consequent engendering of much dissension and partisan bitterness, fails to establish a conspiracy, or even dishonest individual conduct. Beyond possible errors of judgment accompanied by a strong bias leading them to support the advisability of their own action in making the preliminary agreement with the company's manager, the defendants appear to have acted in this part of the transaction as well as throughout the subsequent proceedings with fidelity and for what they considered the welfare of the town. When malfeasance by a public officer is charged, motive may become an important element, and, while pecuniary gain need not be shown, it is significant that the evidence does not disclose any advantage by way of office or of public or private emolument that any of these defendants might have hoped to receive in taking the course they are shown to have pursued. But even if their final action, when those in office sat as a board of selectmen, in not publishing to the community or stating in the warrant their

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vote to buy the plant before the qualified inhabitants were called upon by them in town meeting to pass upon this proposition, in the form submitted, may be open to criticism, yet, if at a later date in the opinion of a majority of the voters the purchase was ill advised, such an error of judgment of itself is not dishonesty nor evidence of corruption without proof of connecting fraudulent conduct or of an unlawful purpose, neither of which is found. In an inquiry involving personal motives and integrity, and where nearly the whole of the oral testimony is given by the implicated officials, as in the present case, much depends upon the appearance of witnesses, the manner in which they give their evidence and their apparent credibility; and these characteristics the printed record, however full, cannot reproduce. From our examination of the evidence, which has been fully reported, we find no substantial reason leading us to doubt the correctness of the result reached by the decree of the county court, which fully exonerated these defendants from all incriminating allegations. *Skehill* v. *Abbott*, 184 Mass. 145.

In whatever form they may be stated by the averments of the parties in their several pleadings, when freed from this entanglement of fraud and conspiracy, there remain two important questions upon the decision of which the rights of the company and the town depend. They are, whether the company is to be granted specific performance of an alleged contract of sale of the plant, or whether the town is to acquire it by purchase under the provisions of St. 1905, c. 477. Before taking them up, the validity of an earlier contract of which the town asks specific performance must be decided, for if this is enforceable these questions become immaterial. This contract with the company was executed on July 22, 1884, and gave the option of buying the waterworks with all connected privileges at a price which was to be fixed by appraisers who either were to be selected by the parties or appointed by this court, and nearly twenty years afterwards on July 14, 1904, the town voted to make the purchase. But at the date of the contract, Pub. Sts. c. 27, § 27, and at the date of the vote, R. L. c. 25, § 31, provided that a town could not buy without the consent of a majority of its selectmen. To constitute such assent affirmative action by them as a board of public officers is required, and is

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not to be implied from the recitals found in the last clause of this contract, that they were authorized to execute it in behalf of the town and the evidence is conclusive that the board in existence when the vote was passed declined to assent. *Attorney General* v. *Eastern Railroad*, 137 Mass. 45, 49. See *Murdough* v. *Revere*, 165 Mass. 109. This precedent condition not having been complied with, even if the contract in other particulars was one which the town could make, the vote was a nullity, and not only was the title of the company left unclouded, but no foundation had been laid upon which a bill in equity can now be maintained to compel specific performance. *Smith* v. *Dedham*, 144 Mass. 177. It therefore becomes unimportant to consider other serious objections which would have to be removed before such relief could be granted, and the result is that the town and the company were left unhampered from entering into subsequent negotiations. Assuming, without further discussion, that the appointment of a committee for this purpose on February 25, 1904, and their conduct in the ensuing negotiations was within the scope of their authority, and that the vote to buy passed by the selectmen on March 13, 1905, was such official action by them as to be a full compliance with the requirements of R. L. c. 25, § 31, we come directly to the point on which this part of the controversy turns.

At some period of time the statute requires that a majority of the voters of the town which is to purchase shall act upon the subject either by ratifying or rejecting a proposed contract of sale. The question now presented is to be distinguished from cases where under acts incorporating water supply companies a condition often is inserted that the town which is to be supplied may buy upon certain terms, or where subsequent legislative permission is given to the municipality to erect and maintain a competing water system, unless the water company already established elects to sell, as in *Braintree Water Supply Co.* v. *Braintree*, 146 Mass. 482; *Rockport Water Co.* v. *Rockport*, 161 Mass. 279; *West Springfield* v. *Springfield Aqueduct Co.* 167 Mass. 128; *Newburyport Water Co.* v. *Newburyport*, 168 Mass. 541; and *Gloucester Water Supply Co.* v. *Gloucester*, 179 Mass. 365. The general law, however, is framed for the purpose of enabling towns to buy in the market if a bargain can be

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made, and, instead of commissioners being appointed to estimate values and fix a price which is the usual method provided by special legislative acts, the selectmen are given authority to act in behalf of the town, and to attend to any preliminary details, and when they have reached a conclusion to report to the town, which then decides whether a contract shall be perfected by its sanction. Ordinarily a board of selectmen would not enter upon such inquiries or make an inchoate agreement to buy unless directed by the municipality, but this precaution of administration does not limit their statutory power, although its exercise well may be made by them to depend upon the will previously expressed of a majority of the voters. The language of the original act, which is St. 1870, c. 93, required the "consent" of a majority of the selectmen "sanctioned and ratified by a majority of the voters" of the town, but this phraseology does not differ in meaning from the language of the last revision. *Reynolds* v. *New Salem*, 6 Met. 340, 343. Under either, the provisions of the proposed contract may be first determined by the selectmen upon conference with the company, which must be presumed, however, to act with full knowledge of the statutory limitation. *Dill* v. *Wareham*, 7 Met. 438. *Wormstead* v. *Lynn*, 184 Mass. 425, 428. But after this has been accomplished a contract of sale does not become binding or enforceable until ratified by a majority of the voters, and when this is done thereafter the contracting parties become respectively the water company and the town. In the prolonged consideration of the whole subject that ensued at numerous town meetings and elsewhere, after the committee had been appointed, it is plain from the evidence that the voters generally had become fully acquainted with all of the important phases of the proceedings, yet, as they were not charged with constructive notice from the record kept by the selectmen, apparently they had not been informed before March 16, 1905, that the board finally had decided to take the works at a price agreed upon between them and the company. *Commonwealth* v. *McGarry*, 135 Mass. 553, 554. But whatever outside information they may have possessed, and from whomsoever derived, the warrant for the town meeting was the only authorized source to which the voters could look to ascertain what subjects

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were presented for their decision, and no valid action could be taken unless there was a specific article covering the subject matter. *Grover* v. *Pembroke*, 11 Allen, 88. *Sherman* v. *Torrey*, 99 Mass. 472. *Whitney* v. *Stow*, 111 Mass. 368. *Reed* v. *Acton*, 117 Mass. 384. *Woodlawn Cemetery* v. *Everett*, 118 Mass. 354, 362. *Locke* v. *Lexington*, 122 Mass. 290. *Bloomfield* v. *Charter Oak Bank*, 121 U. S. 121, 129. While the warrant is not to be construed with technical strictness and intelligible notice is all that is required, yet an article which presents only the general proposition whether a purchase shall be made, but action upon which does not commit the town to buy, is legally distinct from a proposition of ratification which if carried does bind the town. The one presents for consideration a question of initiative public policy, while the other upon being duly voted by the town and accepted by the company creates a contract which cannot be revoked without the assent of both. *Braintree Water Supply Co.* v. *Braintree*, *ubi supra*. The word "ratified" as used in the statute plainly means that when the selectmen issue the warrant they are supposed to have taken appropriate precedent action, otherwise there is no proposal of purchase in existence which can be made the subject of ratification, and which by the ratifying act thereupon becomes an existing contract. *Locke* v. *Lexington*, *ubi supra*. See *New England Dredging Co.* v. *Rockport Granite Co.* 149 Mass. 381, 382. The cases of *Harrington* v. *Harrington*, 1 Met. 404, 407, and *Geer* v. *Fleming*, 110 Mass. 39, on which the company relies to sustain its contention that it was neither necessary for the selectmen to act before the warrant issued, nor for the warrant to state that they had acted, relate to the laying out of town ways. In the performance of this function under R. L. c. 48, § 71, the selectmen act as public officers, and not as agents of the town, and as the way must be laid out, and the report filed seven days before the town meeting at which it is to be accepted, this action need not necessarily be taken before the warrant issues, but if not done within the statutory time, the warrant is rendered nugatory. But even then an article must be inserted sufficiently definite to notify the inhabitants that they may be called upon to act upon the subject. *Jones* v. *Andover*, 9 Pick. 146. Both of these irremediable defects are

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found, for when on March 7, 1905, the warrant for the meeting of March 16, 1905, was issued, the selectmen neither had acted, nor did the warrant contain an article which under the most liberal interpretation conveyed any notice to the voter that by his vote he was irrevocably committing the town to take over the property under a proposed contract of purchase which previously had been negotiated and accepted by the board of selectmen.* Because of this failure of the selectmen to act before they issued the warrant, as well as its insufficiency, original authority was wanting, as the town could not act except as authorized by statute. R. L. c. 11, § 328. *Parsons* v. *Goshen*, 11 Pick. 396. *Smith* v. *Stoughton*, 185 Mass. 329. Consequently the notice by the company of the acceptance of the vote passed at this meeting, the delivery of the deed, its acceptance and recording by the selectmen, even if followed by them with a semblance of taking possession of the works, neither conveyed title to the town, nor imposed upon it any obligation to pay the

* The article of the warrant referring to the purchase was as follows:

"ART. 2. To see what action the town will take in regard to the purchase of any property of the Revere Water Company by voting upon the following questions:

"(1) Shall the town purchase the property of the Revere Water Company within the limits of Winthrop at the price named by Engineer Kimball, namely $250,000?

"(2) Shall the town approve the purchase of the property of the Revere Water Company situated within the limits of Winthrop at the price of $250,000, and authorize the Selectmen to consummate the purchase and incur any proper expenses including counsel fees in connection therewith?

"Also to vote upon the following question: Shall the committee appointed by the town on February 25, 1904, consisting of Winthrop Magee, A. C. J. Pope and John R. Neal, be instructed to procure such legislation as may be proper to enable the town to establish a system of water supply, and authorized to incur any proper expenses including counsel fees in connection therewith?"

The warrant was issued on March 7, 1905. On March 13, 1905, the selectmen voted, "To accept the proposal of the Revere Water Company of April 25, 1904, to sell its property in Winthrop, to this town, and to purchase such property at the price fixed by Engineer Kimball, to wit: Two hundred and fifty thousand dollars ($250,000) provided the Town shall ratify this action in Town Meeting as required by law."

On March 16, 1905, the town meeting was held, and each of the questions in the warrant quoted above was answered in the affirmative by a majority of the voters present and voting.

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stipulated consideration. *Meigs* v. *Dexter*, 172 Mass. 217, 218. If upon the entire evidence there is open any question of law either of ratification or of estoppel by conduct, which we do not intimate, it is effectually disposed of by the vote passed June 8, 1905, whereby the town not only refused to ratify the action of the selectmen taken March 13, 1905, but also specifically rejected the attempted purchase. While the company, therefore, must fail in its effort to have this deed declared to be a valid conveyance, and the town decreed to make payment of the amount for which it claims the property was sold, yet, as the recording of this instrument may have the effect of clouding any title which the town lawfully can obtain under the St. of 1905, c. 477, § 12, it is entitled to a decree of cancellation. *Rogers* v. *Nichols*, 186 Mass. 440. *Sawyer* v. *Cook*, 188 Mass. 163.

If no title vested, the questions raised by the supplemental amendments to the company's bill become immaterial, and the validity of St. 1905, c. 477, must be next considered. The company contends that the act is unconstitutional, while the town asks that in compliance with its provisions the company should be decreed to convey the property treated as an equipped system of supply. This act was passed to enable the town to supply its inhabitants with water, and whether the public interests would be served by conferring such authority was for the Legislature to determine. *Agawam* v. *Hampden*, 130 Mass. 528, 530. It is manifest that, if an independent system might be thus established, the defendant's property probably would be diminished in value, and its business perhaps destroyed by reason of the competition, but the company under the St. of 1882, c. 142, by which it was incorporated, enjoyed no vested rights which gave it immunity from this contingency, or rendered such legislative action unconstitutional. Pub. Sts. c. 105, § 3. *Commissioners on Inland Fisheries* v. *Holyoke Water Power Co.* 104 Mass. 446, 451. *Newburyport Water Co.* v. *Newburyport*, 168 Mass. 541. *Gloucester Water Supply Co.* v. *Gloucester*, 179 Mass. 365. Nor is legislation of this nature an appropriation of private property for a public use without due process of law under the fourteenth amendment of the federal Constitution. *Newburyport Water Co.* v. *Newburyport*, 193 U. S. 561. *Gloucester*

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Water Supply Co. v. *Gloucester*, 193 U. S. 580. If §§ 12 and 13 are eliminated, the act simply authorizes the erection and maintenance of an independent water system, and these sections are not made mandatory. By § 12 the company was left unrestricted in choice, for it either could continue in business and take any risk of pecuniary loss, or could sell to the town which was required to purchase under certain conditions, which only could come into potential existence upon the initiative of the company. *Braintree Water Supply Co.* v. *Braintree*, 146 Mass. 482, 487. Of course it can be said that, in whatever guise the question may be put as to this freedom of choice, there was nothing else the company eventually could do but sell, as the territory and patronage were too limited to afford a reasonable probability that two independent water systems could be supported, or that the town in reality never intended to build but only to acquire the company's plant. But the very terms of these sections contemplate that the company may choose to sell, and, if it does, then the town must purchase at a valuation which if not fixed by agreement must be determined by commissioners. St. 1905, c. 477, §§ 12, 13. *Newburyport Water Co.* v. *Newburyport*, *ubi supra*. If the privilege of taking water under the metropolitan water system within the territory of which the town of Winthrop is situated could not be exercised unless the town first acquired the works of any water company within its limits, this furnishes no argument against the validity of the statute, which makes express provision for the accomplishment of this purpose by the acquisition of the company's works if it decides to sell. See Sts. 1895, c. 488, § 3; 1898, c. 392, and 1899, c. 349.

The statute being found constitutional, the town contends that a valid contract having been made according to its provisions, which the company has failed to perform, specific performance should be decreed. It therefore becomes essential to determine whether such a contract exists. After the act was accepted by the town on July 19, 1905, the company under § 12, without waiving either its claim as to the validity of the prior sale or its contention that the statute was unconstitutional, notified the selectmen of its desire to sell. By this action it took the position that, if the questions within the protest were

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decided adversely, then the offer was an unqualified proposal of sale which it must make unless it elected to continue in business, and which the town by force of the statute was equally bound to accept. While acceptance under the statute is neither limited in time, nor to any number of town meetings, yet the town undoubtedly was obliged to act within a reasonable time after the offer had been made, and as the rejection at the town meeting held on September 25, 1905, did not exhaust the right of the town again to vote upon the proposition of purchase, so the second town meeting held on November 28, 1905, at which the town voted to buy was within a reasonable period. Under the statute the company was required within thirty days to complete the transaction by conveying its property unincumbered by a good and sufficient deed. The action of the company in electing to sell upon the statutory terms must be treated as voluntary, for it could have gone on leaving the town to establish its own system, but the offer having been duly accepted the town is prohibited by § 12 from taking such action. At this point the next necessary step is the passing of title by the company, which has not been done, but there are no provisions found in the statute which prevent a conveyance being executed and delivered after the thirty days have expired, which may be taken as only prescribing for this purpose a minimum limit of time. It is assumed by the statute that the company's property as a whole is of such a character that it should be conveyed by deed, and if, having been granted general authority to make and receive such a conveyance, an agreement in writing had been executed by the parties as between vendor and purchaser, which embodied similar terms of sale, a court of equity in its discretion could decree specific performance on a bill brought by either of them. *Old Colony Railroad* v. *Evans*, 6 Gray, 25, 30. *Thaxter* v. *Sprague*, 159 Mass. 397. The doctrine that where a party can be fully compensated by damages he may be remitted to his suit at law has no application, for if equitable relief is denied there is no other adequate mode of redress. *Roberts* v. *Cambridge*, 164 Mass. 176, 181; *S. C.* 170 Mass. 199. See *Jones* v. *Newhall*, 115 Mass. 244, 248. The rights respectively to sell and to buy in the manner prescribed are specifically conferred by the statute, for otherwise R. L. c. 25, § 31, would have to be followed, or

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further special legislation obtained. Because the company has elected to sell, the town cannot proceed to build, and the delay and uncertainty caused from litigation in various forms to ascertain the respective rights of the parties would be deemed sufficient to relieve the company from the forfeiture found in the last sentence of § 12, or it may be said that the town by bringing its bill has waived this provision. To deny appropriate relief would enable the company to take advantage of a refusal to perform after its reasons for non-performance are shown to be untenable, and also when performance only became obligatory and essential by reason of its initiatory step. The elements of compensation under § 13 are not to be determined or the amount estimated until the title passes, and if the board of water commissioners and the company agree upon the price, and this is satisfactory to the town, no further consideration of either will be required, but if they disagree, or the town rejects their agreement, resort may be had to this court, and until thus presented, any consideration of the important questions which then may arise would be premature.

The bill of the company must be dismissed, but, as a receiver has been appointed who has administered the property during the litigation, the terms of the decree must be settled before a single justice. A decree for the cancellation of the deed, and for specific performance of the contract made under St. 1905, c. 477, § 12, is to be entered in favor of the town, although as to the individual defendants the decree from which it took an appeal is affirmed with costs.

So ordered.

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FAUSTINA M. MOORE *vs.* NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY.

Middlesex. March 30, 1906. — June 21, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, & SHELDON, JJ.

Insurance, Life. *Words*, "Sane or insane."

Under R. L. c. 118, § 73, an application for life insurance, of which a copy is attached to the policy issued upon it and which is referred to therein, forms part of the contract of insurance although neither the original application nor the copy of it has printed upon it in large bold-faced type or otherwise the words "Under the laws of Massachusetts, each applicant for a policy of insurance to be issued hereunder is entitled to be furnished with a copy of this application attached to any policy issued thereon."

A policy of life insurance incorporated by reference the following agreement contained in the application for insurance signed by the insured: "And I do further agree that if within two years from the date of said policy I shall pass south of the Tropic of Cancer, or . . . shall within one year from the date of said policy whether sane or insane die by my own hand, then and in every such case any policy issued on this application shall be null and void." *Held*, that the words "sane or insane" covered every case of suicide, and that there could be no recovery on the policy where the insured killed himself within the year although his act "was the result of a blind and irresistible impulse over which the will of the deceased had no control and was not an act of volition," and "he did not know or understand the nature and consequences of the act."

LATHROP, J. This is an action of contract on a policy of life insurance issued to Walter T. Moore on May 27, 1904, by a foreign corporation doing business here, under an agent duly authorized, and the policy was delivered here. Both parties have argued the case on the assumption that the policy is a Massachusetts contract, and we so treat it.

On July 29, 1904, Walter T. Moore, by virtue of the power reserved to him in the policy, assigned the same to his wife Faustina M. Moore, the plaintiff in this action.

The answer contained a general denial and set up in defence that Walter T. Moore died by his own hand, within one year from the date of the policy, and also set up the following agreement contained in the application for the insurance, signed by Walter T. Moore: "And I do further agree that if within two years from the date of said policy I shall pass south of the Tropic of

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Cancer, or . . . shall within one year from the date of said policy whether sane or insane die by my own hand, then and in every such case any policy issued on this application shall be null and void."

The plaintiff filed a replication to the new matter set up in the answer, alleging that the application did not comply with the R. L. c. 118, § 73, and did not form part of the policy, and denying that Walter T. Moore died by his own hand.

Later the plaintiff amended the replication, by adding thereto the following clause: "And the plaintiff further says that if the defendant shall introduce evidence tending to show that the death of Walter T. Moore was self-inflicted or that the instrumentality was operated by his hand, then the plaintiff says that the death was caused under such a combination of circumstances that it was not the result of the will and intention of the deceased, adapting the means to the end and contemplating the physical nature and effects of the act; that it was the result of a blind and irresistible impulse over which the will of the deceased had no control and was not an act of volition, that he did not know or understand the nature and consequences of the act."

This amendment was demurred to and the demurrer sustained. The plaintiff appealed.

At the trial in the Superior Court there was evidence tending to show that Mr. Moore was in financial difficulty in Lowell; that he left Lowell on November 22, 1904, the day on which the directors and some of the creditors of the Lowell Coal Company, of which Moore was manager and which was in financial difficulty, were to have a meeting, went to his summer place in Amherst, New Hampshire, which he had closed for the season about a month before, but which was then occupied by his man looking after his live stock and other property there, arrived in the afternoon, talked with his hired man about his troubles and the possibility of having to sell his place, directed his man to go for his team to drive him to the station, and then went into the house alone; that a short time thereafter, after waiting for him to come out, his man went into the house, passed through the dining room and kitchen into the wood-shed, where he found Mr. Moore lying on his back on the ground, dead; that there was a rifle in an iron vise at one end of a work-bench, and

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attached to the trigger was a string which apparently had been passed through a hasp; that Moore had been shot through the body and the bullet was found imbedded on the opposite side of the shop at a spot towards which the rifle was pointed; that several hours thereafter his man found lying upon Moore's overcoat in the dining room a piece of paper in Moore's handwriting, but not signed by him, bidding good bye to his mother and wife, and giving directions as to where to telephone.

During the course of the trial the plaintiff offered in evidence the original policy expressly excluding from his offer two photographic copies annexed thereto by attachment, one of which was headed "Application to the Northwestern Mutual Life Insurance Company of Milwaukee, Wisconsin." The other photographic copy was of the declaration made to the medical examiner. The defendant objected to the offer and the judge stated, "I will allow the entire contract put in, and I will rule later upon the effect of the application," to which ruling the plaintiff excepted. Subsequently the defendant offered the original application, which the judge admitted against the objection and exception of the plaintiff. Neither the original application nor the copy had upon it in large, bold-face type, nor in any form of type or writing, the words: "Under the laws of Massachusetts, each applicant for a policy of insurance to be issued hereunder is entitled to be furnished with a copy of this application attached to any policy issued thereon."

The plaintiff made six requests for instructions, which were not given.

The jury returned a verdict for the defendant; and to the question "Did the deceased Walter T. Moore die intentionally by his own hand?" the jury answered "Yes."

The case is before us on the plaintiff's exceptions, and on her appeal from the order sustaining the demurrer to the amendment of the replication.

1. The first question which it is necessary to consider is whether the application forms part of the policy. This in various ways is the subject of the six requests which were refused in the court below. The answer to the question depends upon the construction to be given to the following words which form a part of the R. L. c. 118, § 73: "Every policy which contains

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a reference to the application of the insured, either as a part of the policy or as having any bearing thereon, must have attached thereto a correct copy of the application, and unless so attached the same shall not be considered a part of the policy or received in evidence. Each application for such policy shall have printed upon it in large bold-faced type the following words: 'Under the laws of Massachusetts, each applicant for a policy of insurance to be issued hereunder is entitled to be furnished with a copy of this application attached to any policy issued thereon.' "

We are of opinion that it was the intention of the Legislature to inform the insured that he was entitled to have a copy of the application attached to his policy, and that when this was done, the application formed a part of the contract, although the words required to be printed in bold-faced type were omitted. If the Legislature had intended otherwise a very slight change in the language of the section would have effected their intention. We are of opinion therefore that the application was rightly admitted, and that the rulings requested were rightly refused.

2. The remaining question is raised by the demurrer to the amended replication. While by the R. L. c. 178, § 31, the plaintiff may at any time before trial file a replication to the answer "clearly and specifically stating any facts in reply to new matter therein," yet as a general rule no further pleading is required after the answer. And the same section goes on to provide: "Any new matter in avoidance of the action which the answer contains shall be considered to be denied by the plaintiff without a replication, unless the court, upon motion of the defendant, requires him to reply thereto, and to state what part, if any, he admits or denies."

In our opinion the demurrer to the amended replication was rightly sustained. Under the old form of policy which exempted from the terms of the contract cases of death by suicide or by the hand of the assured, there was much conflict in the authorities, and in *Daniels* v. *New York, New Haven, & Hartford Railroad*, 183 Mass. 393, 397, it was said by Chief Justice Knowlton, that all agreed "that death self-caused in an uncontrollable frenzy, without knowledge or appreciation of the physical nature of the act, would not be death by suicide or by one's own hand." It

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was further said to be the doctrine of this court as stated in *Dean* v. *American Ins. Co.* 4 Allen, 96, and in *Cooper* v. *Massachusetts Ins. Co.* 102 Mass. 227, following certain English cases, "that if death is the result of volition by one who has a conscious purpose to end his life, and has intelligence to adapt means to ends, it is his own act within the meaning of such a contract, even though he is so far insane as not to be morally responsible for his conduct." It was also said that in some other jurisdictions, including the Court of Appeals of New York and the Supreme Court of the United States, it had been held that "if one, by reason of his insanity, is unable to appreciate the nature and qualities of his own act in its relations to the moral world, so that he is not criminally responsible for it, he does not commit suicide or cause death by his own hand within the meaning of such a policy, if he deliberately and wilfully takes his own life."

To meet the difficulty caused by this conflict of decisions, the words "sane or insane" were introduced into policies of insurance.

In *Bigelow* v. *Berkshire Ins. Co.* 93 U. S. 284, where the policy contained the clause avoiding the policy if the insured should die by suicide, sane or insane, the defendant set up in its answer that the insured died from the effects of a pistol wound inflicted upon his own person by his own hand, and that he intended by this means to destroy his life. The replication alleged that the insured, when he inflicted the pistol wound upon his person by his own hand, was of unsound mind, and wholly unconscious of his act. A demurrer to the replication was sustained. It was said by Mr. Justice Davis in delivering the opinion of the court, that the words "sane or insane" must receive a reasonable meaning, and, further: "Nothing can be clearer than that the words, 'sane or insane,' were introduced for the purpose of excepting from the operation of the policy any intended self destruction, whether the insured was of sound mind or in a state of insanity."

In *De Gogorza* v. *Knickerbocker Ins. Co.* 65 N. Y. 232, the words "sane or insane" were given their full meaning. The trial judge had instructed the jury that "if the act causing the death of the assured was the involuntary act of one incapable of exercising his will, then the company would be liable." This

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was held to be erroneous. And in an elaborate opinion of the court it is said: "We prefer to place our decision upon the ground that the words of the proviso in the policy before us, by plain rules of interpretation, exempt the defendant from liability. That this language, in view of previous decisions, was inserted for such a purpose, cannot be doubted, and that it was agreed to by both the insured and the insurer is not questioned, and that it is a provision allowed by law, no one denies. We are to say from these words what the parties must have intended, and we cannot properly say that additional words having no meaning were inserted in the contract, and if they mean anything it is just what the words commonly import, and that is, if death ensues from any physical movement of the hand or body of the assured proceeding from a partial or total eclipse of the mind, the insurer may go free. We are not altogether unmindful of the force of the proposition that a man does not die by his own hand who has not sufficient mind to will his own death, and it is not, perhaps, entirely easy to see in what precise words in our language the idea may be accurately and artistically expressed that a totally insane man may take his own life. But the question seems to involve more — the refinement of language — than the application of practical sense, and we are of the opinion that, in the common judgment of mankind, it will be considered that when a totally insane man blows his brains out with a pistol that he will be said to have died by his own hand within the meaning of a policy such as we have now under consideration." See also *Travellers' Ins. Co.* v. *McConkey*, 127 U. S. 661; *Mutual Ins. Co.* v. *Kelly*, 114 Fed. Rep. 268, 280; *Clarke* v. *Equitable Assur. Soc.* 118 Fed. Rep. 374; *Pierce* v. *Travelers' Ins. Co.* 34 Wis. 389; *Billings* v. *Accident Ins. Co.* 64 Vt. 78; *Scarth* v. *Security Mutual Life Society*, 75 Iowa, 346; *Mutual Reserve Fund Assoc.* v. *Payne*, 32 S. W. Rep. 1063, 1066; *Adkins* v. *Columbia Ins. Co.* 70 Mo. 27; *Chapman* v. *Republic Ins. Co.* 6 Biss. 238; *Tritschler* v. *Keystone Benefit Assoc.* 180 Penn. St. 205; *Sargent* v. *National Ins. Co.* 189 Penn. St. 341; *Keefer* v. *Modern Woodmen*, 203 Penn. St. 129; *Sabin* v. *National Union*, 90 Mich. 177; *Scherar* v. *Prudential Ins. Co.* 63 Neb. 530.

On reason and on the authorities, we can have no doubt that the old rule is done away with, and that the words "sane or in-

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sane" cover every case of suicide. Of course, a death by shooting may be accidental, but there is nothing in this case to show any accident. The evidence shows clearly a case of suicide, and it makes no difference what the state of mind of the person committing suicide was. The exceptions must therefore be overruled and the appeal dismissed.

So ordered.

W. H. Bent, for the plaintiff.
H. G. Allen, for the defendant.

HELEN H. JENKINS *vs.* EVELYN A. ELIOT.

Suffolk. May 15, 1906. — June 21, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Equity Pleading and Practice, Parties. *Equity Jurisdiction*, To enforce performance of negative contract. *Good Will*. *Contract*, Construction.

In a suit in equity by a milliner to restrain the defendant from carrying on the millinery business in Boston after having sold her good will to the plaintiff and the plaintiff's partner and agreed not to engage in the millinery business in Boston for the term of ten years, if it appears that the plaintiff and her partner after purchasing the defendant's business dissolved their copartnership and that the plaintiff's partner sold all her interest in the business to the plaintiff and made to her an absolute and unconditional assignment of it, the plaintiff's former partner need not be made a party to the suit, having no interest which could be affected by a decree therein.

In a suit in equity by a milliner to restrain the defendant from carrying on the millinery business in Boston after having sold her good will to the plaintiff and the plaintiff's partner and agreed not to engage in the millinery business in Boston for the term of ten years, it appeared that the plaintiff and her partner after purchasing the defendant's business dissolved their copartnership and that the plaintiff's partner sold all her interest in the business to the plaintiff who thereupon formed a new partnership for the purpose of carrying on the millinery business and transferred to her new partner half of her interest therein. The contract by which the defendant and the defendant's partner sold their good will to the plaintiff and the plaintiff's former partner contained a provision that if at any time before the expiration of ten years the plaintiff and her partner should cease to carry on the millinery business in Boston the defendant and her partner might at such time, if they wished, re-engage in the millinery business in Boston either jointly or separately. The defendant contended that because the plaintiff's partner sold out to the plaintiff the defendant's negative contract was at an end and she might re-engage in business. *Held*, that the

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plaintiff and her former partner had not ceased to carry on the millinery business in Boston within the meaning of the contract, and that the plaintiff, having acquired all the interest of her former partner represented both that partner and herself and was entitled to enforce the contract.

LATHROP, J. This is a bill in equity, filed in the Superior Court on October 18, 1905, in which the plaintiff seeks to restrain the defendant from carrying on the millinery business in Boston, and to recover damages by reason of the carrying on of such business. The defendant filed an answer containing a demurrer. The judge of the court below found the following facts, and reserved the case on the demurrer and the facts for our consideration, leaving the question of damages for further proceedings.

The defendant and one Carolyn A. Webb, on February 9, 1905, and for a considerable time before that date, carried on a millinery business as copartners under the name of Eliot and Webb, at No. 100 Boylston Street, Boston. On that day the defendant and Webb sold to the plaintiff and one L. M. Prescott certain stock in trade and the good will of the business, handed to them a list of customers and, subject to certain conditions, agreed with them not to engage in the millinery business in Boston for the term of ten years from that date, and agreed during the term to allow them to carry on the business under the name of Eliot and Webb. The plaintiff and Prescott as copartners carried on the millinery business at the location until August 26, 1905, when they dissolved their copartnership, and Prescott sold her interest therein to the plaintiff. The plaintiff thereupon, on August 26, formed a new copartnership with one Harriet F. Dearborn for the purpose of carrying on the millinery business and transferred to Dearborn a half interest therein; and as copartners they have since carried on the business and Prescott has not since been engaged in the millinery business in Boston. On October 12, 1905, the defendant re-engaged in the millinery business in Boston at No. 739 Boylston Street, and has since continued to carry on such business, and has sent cards to several of the persons whose names appeared in the list hereinbefore referred to.

Evidence was introduced by witnesses tending to show that persons who had formerly traded with Eliot and Webb and

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thereafter had traded with Prescott and Jenkins had ceased to trade with the plaintiff and had purchased of the defendant since the sending of the cards by the defendant. The judge found as a fact that the defendant has solicited and obtained trade from persons whose names were upon the list of customers delivered by her with the bill of sale of February 9, 1905.

1. The first contention of the defendant is that Prescott should have been a party to the bill. By the agreement of August 26, 1905, between the plaintiff and Prescott, the latter sold, assigned and transferred to the plaintiff "all her right, title and interest in and to the said business, and to the furniture, fixtures and stock in trade heretofore used in said business . . . together with the good will of the business." The assignment being absolute and unconditional, and Prescott having no remaining interest which can be affected by a decree in this cause, we see no reason for making her a party. *Montague* v. *Lobdell*, 11 Cush. 111, 115. *Currier* v. *Howard*, 14 Gray, 511, 513. *Pratt* v. *Boston & Albany Railroad*, 126 Mass. 443. *Allyn* v. *Allyn*, 154 Mass. 570, 574.

2. The next contention is that the defendant had the right to re-engage in the millinery business in Boston. It appears by the agreement made at the same time as the sale that Prescott and Jenkins paid the sum of $1,500 in cash, and gave their joint and several notes, one to the defendant and one to Webb, each for the sum of $250, payable without interest on July 1, 1905. It further appears that Eliot and Webb agreed that Prescott and Jenkins "may carry on business under the name of Eliot & Webb for a period of ten years." Then follow certain conditions to be performed by Prescott and Jenkins, none of which are alleged to have been broken. The particular provision upon which the defendant relies is the following: "that if at any time prior to the expiration of said ten years, the said Prescott and Jenkins should cease to carry on the millinery business in said Boston . . . then the said Eliot and Webb may at such time, if they wish, re-engage in the millinery business in said Boston, either jointly or separately."

The defendant contends that because Prescott sold out to Jenkins, the contract is at an end, and that the defendant may re-engage in business; but we are of opinion that this is too

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narrow a view to take of the agreement. The plaintiff represents both Prescott and herself. She has all the interest which Prescott had, and is entitled to enforce it. The interlocutory decree entered in the Superior Court is in our judgment correct, the demurrer is overruled, and the cause is remitted to that court for the assessment of damages.

So ordered.

W. H. Preble, for the plaintiff.

G. Z. Adams & G. R. Blinn, for the defendant.

GEORGE A. WILBER & others *vs.* SUPREME LODGE NEW ENGLAND ORDER OF PROTECTION, LUCY COOPER, claimant.

Suffolk. May 17, 1906. — June 21, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, & LORING, JJ.

Fraternal Beneficiary Corporation.

Under St. 1882, c. 195, § 2, now incorporated in R. L. c. 119, § 6, a person may be found to be dependent on a member of a fraternal beneficiary corporation, so as properly to be named as a beneficiary of a death benefit, if the assistance rendered by the member to such person was not trivial or casual or wholly charitable, but was substantial and material, and if the obligation to furnish it, although it might not be enforceable at law, rested upon moral and equitable grounds and the assistance was furnished in recognition of that obligation.

Under St. 1882, c. 195, § 2, now incorporated in R. L. c. 119, § 6, a woman named in a certificate of a fraternal beneficiary corporation as a beneficiary to whom a death benefit is to be paid may be found to have been dependent upon the member within the meaning of the statute where she was the sister of the deceased wife of the member and came with another sister, who was not strong and could not work, to live with the member and his wife upon his agreement that if the sister that became his wife would marry him the other sisters should go with her and always have a home as long as he lived, and where after the death of his wife the member said that they would go on "giving in together and keeping house" just as they did before and that if the sisters "would keep on keeping house for him" they might go on and live in the same way they had been living, and where in pursuance of this arrangement the home was kept up as before until the death of the member, the sister who could not work acting as treasurer, the member contributing from $12 to $15 a week and the person named as beneficiary contributing $4 a week and sometimes more.

CONTRACT, by the three children of George T. Wilber, deceased, on a membership certificate issued by the defendant, a

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fraternal beneficiary corporation, to recover the amount of $2,000 named therein. Writ in the Municipal Court of the City of Boston dated December 10, 1903.

The defendant admitted its liability, but alleged that one Lucy Cooper, a beneficiary named in the policy to the amount of $1,000 was a claimant for a part of the fund in question, and upon the defendant's motion, she was summoned in as a claimant.

On appeal to the Superior Court the case was tried before *Harris*, J. The certificate sued on was dated April 30, 1901, and contained the following provision: "Said member is entitled to all the rights and privileges of membership in the New England Order of Protection in the life and benefit fund of the order to the amount of Two Thousand (2,000) Dollars, which sum shall at his death be paid to George A. Wilbur, Herbert T. Wilbur, and Emma F. Wilbur, One Thousand Dollars divided equally, and Lucy Cooper One Thousand (1000) Dollars related to said George T. Wilbur as children and dependent."

The evidence upon the question whether the claimant, Lucy Cooper, was dependent upon George T. Wilber, so as to be entitled to be named as a beneficiary under St. 1882, c. 195, § 2, is stated in the opinion.

At the close of the evidence the plaintiffs requested the judge to direct a verdict for the plaintiffs for the full amount of the fund, namely, $2,000, and to rule that there was no evidence that Lucy Cooper was a dependent or relative of George T. Wilber under the statute. The judge refused so to rule. The jury returned a verdict for the plaintiffs in the sum of $1,000, and a verdict for the claimant in the sum of $1,000. The plaintiffs alleged exceptions.

J. F. Sweeney & H. A. Wilson, for the plaintiffs.

A. S. Hayes & A. G. Sleeper, for the claimant.

HAMMOND, J. The question is whether the evidence warranted a finding that Lucy Cooper was "dependent" upon George T. Wilber within the meaning of that word as used in St. 1882, c. 195, § 2, now incorporated in R. L. c. 119, § 6.

She testified that before July 14, 1897, she and her two sisters Agnes and Georgianna were all keeping house together in Cambridge; that she and her sister Agnes worked out and earned the money necessary to maintain the home; that Geor-

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gianna, who was not strong, did the housework; that all this was known to Wilber; and that on July 14, 1897, Agnes married him; that before the marriage Agnes said to Wilber that she would not marry and break up the home of herself and sisters, and that he said that if she would marry him, all the sisters should go with her and "always have a home as long as he lived."

She further testified that after the marriage the old home was broken up and they all went to live with Wilber; that the arrangement was that Agnes should "run the house" and Georgianna would help her in the work, and she (the witness) should "give in what she could"; that in pursuance of that arrangement Agnes and Georgianna kept the house while Wilber and the witness worked out and supported the family, he contributing from $12 to $15 a week and she $4 a week, and sometimes more; that these sums were turned over to Agnes, who bought the food, paid the rent and "ran the house on it," and Wilber and Agnes "had their clothes out of it." In a word, they were all members of the same household, each contributing either by money or by work to the maintenance of the common home.

She further testified that, after the death of Agnes, Wilber said that "we would go on keeping house just the same as we did before my sister died, giving in together and keeping house," and also that "If we would keep on keeping house for him, we might go on and live the same way we had been living." She also testified that in pursuance of that arrangement the home was kept up as before until Wilber's death, Georgianna acting as treasurer.

There was also evidence that Wilber, after the death of Agnes, said to Lucy that he had made her one of the beneficiaries because his children (by a former marriage) all had good homes, and that if anything happened to her she had her sister Georgianna to look after and needed the money.

In *McCarthy* v. *New England Order of Protection*, 153 Mass. 314, 318, it was said that in interpreting this statute "legal dependency [is] not the test," and that the statute should be liberally construed. Morton, J., in giving the opinion, uses the following language: "Trivial or casual, or perhaps wholly

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charitable assistance, would not create a relation of dependency, within the meaning of the statute or by-laws. Something more is undoubtedly required. The beneficiary must be dependent upon the member in a material degree for support, or maintenance, or assistance, and the obligation on the part of the member to furnish it must, it would seem, rest upon some moral, or legal, or equitable grounds, and not upon the purely voluntary or charitable impulses or disposition of the member."

In the present case the jury might properly have found that Lucy was dependent upon the assistance of Wilber to support herself and Georgianna in his lifetime in the same degree of comfort in which they had lived before his marriage to Agnes, and that Wilber had agreed in substance that the family should not be broken up, and that such loss as might be suffered from the fact that Agnes, in consequence of her marriage, had become a non-producer, should be made up by his contribution to the common fund. They might further have found that after the death of Agnes it was the assistance so rendered by Wilber which enabled Lucy and Georgianna to live in the same degree of comfort as before, and that this assistance was given and received, not as a gratuity, but under a mutual recognition of a moral obligation on the part of Wilber to stand to his promise; and that under the pressing sense of such an obligation Wilber made Lucy a beneficiary under the policy. In other words, the jury might have found that the assistance was not trivial or casual or wholly charitable, but was substantial and material, and that the obligation to furnish it, although perhaps not enforceable in law, nevertheless rested upon moral and equitable grounds, and that it was furnished not gratuitously, but in recognition of that obligation. This was enough. *McCarthy* v. *New England Order of Protection*, 153 Mass. 314.

Exceptions overruled.

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PATRICK KEELEY *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. May 17, 1906. — June 21, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, & LORING, JJ.

Negligence. Elevated Railway.

In an action against an elevated railway company, which operated its elevated trains by means of a third rail transmitting electric power, for personal injuries incurred by the plaintiff while working as a night laborer with a large gang of workmen in relaying about five hundred feet of the defendant's north bound track, it appeared, that the plaintiff was injured from being burned by a flash of electricity when in compliance with an order of his foreman he struck the third rail with a long bladed hammer, called a chisel, that the accident happened about half past four o'clock in the morning, that the electric power usually was turned off the rail between the morning hours of one and five o'clock, when the trains did not run and the night gangs were at work on the tracks, that on the night of the accident the men were instructed when they went to work at one o'clock that the third rail was dead, that this was true, but that during the night the power was turned on for about one half the length of the job including the place where the plaintiff was at work, that this was done for the purpose of picking up some old rails on the south bound track by means of a working train, that for this purpose it was unnecessary to turn on the power on the north bound track which was being relaid, because the old rails could have been reached wholly by the south bound track, that some of the men were told in a general way that a portion of the rail was alive but the plaintiff was not so informed, and the evidence was conflicting as to whether the foreman under whom he worked was so informed, that at the time the plaintiff was injured he was assisting to remove a rail saw from one of the rails of the track within a few inches of the third rail, and in the performance of his work was ordered by the foreman to strike a blow with the chisel, which the foreman handed to him for the purpose, the use of which necessitated hitting the third rail, that he asked the foreman whether it was all right, and the foreman answered that the rail was dead, and the accident followed, that the defendant's engineer and foreman in control of the power had full knowledge that a large job was to be done that night, that it would have been an easy matter and a reasonable precaution to make the third rail dead along the whole portion of the track which was undergoing repairs, and that the defendant's chief operator received no orders that night to make the third rail dead. *Held*, that the jury were warranted in finding that the plaintiff was in the exercise of due care; that the plaintiff did not assume the risk of the unnecessary and concealed danger in the place where he was set at work; and that there was evidence of negligence on the part of the defendant in turning on the power on the north bound track when the south bound track could have been used for the running of the working train.

LATHROP, J. This is an action of tort for personal injuries sustained by the plaintiff while in the employ of the defendant.

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The declaration contained several counts, some at common law, and some under the R. L. c. 106, § 71. In the Superior Court the jury returned a verdict for the plaintiff on the second count, which alleged in substance that the plaintiff was set to work in a dangerous place, and while in the exercise of due care, and without being warned of the danger, was injured. At the close of the evidence the defendant asked the judge to rule that upon all the evidence the plaintiff could not recover. The judge refused so to rule and submitted the case to the jury, under instructions which we must assume to have been correct. The only exception is to the refusal to rule as requested.

The jury were warranted from the evidence in finding the following facts.

The plaintiff, employed by the defendant as a night laborer, was set at work as a member of a large gang of workmen, to assist in relaying about five hundred feet of the defendant's north bound track on its elevated structure on Washington Street, near Rollins Street, Boston. While so employed, and when working near the third rail, so called, where he was directed to work, he was seriously injured by burns from a flash of electricity, caused by his chisel coming in contact with this rail, which at the time the defendant permitted to be alive.

The accident occurred at about half past four o'clock on the morning of March 20, 1902. The electric power used to operate the trains on the tracks ran through the third rail, and was generally turned off the rail between the morning hours of one o'clock and five o'clock, at which time the trains did not run, and the night gangs were at work on the tracks. The voltage used in the third rail was from five hundred to six hundred volts, and the amperage was very large; the burning effect is from the amperage; a person could be killed by a voltage of five hundred volts. The electricity in the third rail could be turned on or shut off, from either or both tracks, entirely at the will or control of the defendant, by switches at the power stations at Sullivan Square or Atlantic Avenue, or locally from either track by switches placed from four hundred to five hundred feet apart. The turning of the switches at Rollins Street and at Castle Street would have rendered the rail dead at the point of the accident, as it also could have been made dead from

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the power station. These local switches were under the control of the defendant's engineer, who testified that he knew of no reason for the use of the power on that night, between those streets.

It was also in evidence that an appliance termed a jumper was in common use at the time of the accident, by which the power could have been cut off from the rail for any assigned distance, even the length of a single rail, along the track, and the third rail made harmless; that the appliance used for this purpose could be handled by any one of ordinary intelligence. The defendant kept for use, when working near the third rail during the day, rubber blankets to throw over the rail, and the electricians at times used test lamps to ascertain whether the power was off or on. The workmen always had general instructions that the power was off while they were at work at night, and each morning about five o'clock one of the engineers would come around and state that the power was about to be turned on.

The defendant's engineers and foremen, having control of the power, had full knowledge that a large job was to be done that night. Preparations were being made for some days before the work was done to replace about five hundred feet of track; new rails had been brought to the place some days before and placed between the tracks, and in order to reduce the amount of work to be done on the night of relaying them the new rails had been assembled, that is, joined together in sections of three. To insure the completion of the work in one night, all three of the gangs, ordinarily employed in different places on the structure and in the subway, were consolidated and set to work together under the foreman of the plaintiff's gang.

It would have been an easy matter and a reasonable precaution to make the third rail dead along the whole distance which was undergoing repairs. This was the unanimous opinion of the defendant's engineers and managers. The defendant's chief operator received no orders on that night to make the third rail dead. Telephones were in use between the various stations on the structure and to the power houses.

On the night the plaintiff incurred his injuries the men were instructed, when they went to work at one o'clock, that the third rail was dead. The defendant's records show that the third rails

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on both tracks were dead at 1.10 A. M. During the night instructions came from Sullivan Square to the electrician in charge of that section where the work was going on, to open the switches at Castle Street, which had the effect of putting the power on to the third rail for about half the length of the job. Some of the men were told in a general way that a portion of the rail was alive. The plaintiff was not so informed. The evidence was conflicting as to whether the foreman, Hellen, was so informed. The electrician placed a red lantern at the point of the dividing line between the live and dead rail, but the red lantern would indicate nothing to any one as to which side of the lantern the rail was alive and dangerous. The plaintiff did not see the lantern which, being at Rollins Street, must have been about two hundred and fifty feet from the place of the accident.

The cause of turning on the power at Castle Street was to let a work train go over the cross over at Castle Street to pick up some old rails on the south bound track at Pelham Street and Northampton Street. It was not necessary that the power should have been turned on there for that purpose because, by using the south bound track through the subway, no occasion existed for any power to be applied to the third rail of the north bound track. The chief operator at the power station testified that it would have been an easy matter to keep the rails dead, and that he received no orders to make them dead on that night.

At the time the plaintiff was injured he was assisting to remove a rail saw from one of the running rails within a few inches of the third rail, and in the performance of his work was directed by his foreman to strike a blow with a chisel (a long-bladed hammer) handed to him by the foreman for the purpose, the use of which necessitated his hitting the third rail. He asked the foreman if it was all right, and in response the foreman told him the rail was dead. The plaintiff had no knowledge of the manner of using the power in the third rail or as to the switches used for that purpose. He had no personal knowledge of whether the power was on the rail or off, except that he was told it was off.

On these facts we can have no doubt that the jury were warranted in finding that the plaintiff was in the exercise of due care; and that it cannot be said, as matter of law, that the

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plaintiff assumed the risk. Nor can we have any doubt that the defendant was negligent in turning on the power on the north bound track when the south bound track could have been used for the running of the working train. The law applicable to this subject is well stated by Mr. Justice Knowlton in *Hopkins* v. *O'Leary*, 176 Mass. 258, 264, as follows: "The general duty to provide a place for the plaintiff which was reasonably safe, having reference to the kind of business in which the defendant was engaged, was so far personal to himself as a master that he could not escape responsibility by delegating it to another. *Toy* v. *United States Cartridge Co.* 159 Mass. 313. While the plaintiff assumed the obvious risks of the business, he did not assume the risk from the failure of the defendant, either personally or through a superintendent, to perform the ordinary duties of an employer in providing against unnecessary or concealed dangers in places in which laborers were set to work. The jury were rightly permitted to pass upon the question whether the defendant was negligent in this particular. *Rogers* v. *Ludlow Manuf. Co.* 144 Mass. 198, 205. *Neveu* v. *Sears*, 155 Mass. 303. *O'Driscoll* v. *Faxon*, 156 Mass. 527. *Coan* v. *Marlborough*, 164 Mass. 206. *Burgess* v. *Davis Sulphur Ore Co.* 165 Mass. 71. *Dean* v. *Smith*, 169 Mass. 569."

This rule applies to corporations as well as to individuals. *Rogers* v. *Ludlow Manuf. Co.* 144 Mass. 198, 201, *et seq.* *Toy* v. *United States Cartridge Co.* 159 Mass. 313. *Burgess* v. *Davis Sulphur Ore Co.* 165 Mass. 71.

While there was conflicting evidence on the question whether the foreman of the plaintiff's gang had been informed that the power had been turned on, the jury may have found that he had not been so informed. If so, and he supposed that the rail was dead, the order to the plaintiff was not a negligent one; and the negligence might well be found to be that of some one representing the company, to whom the defendant had entrusted the work, in allowing the power to be turned on to the third rail of the north bound track, and for whose negligence the defendant is liable.

Exceptions overruled.

R. A. Sears, J. F. Sweeney & H. A. Wilson, for the defendant.

W. B. Grant, for the plaintiff.

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LYDIA N. RAYMOND *vs.* COMMONWEALTH.

Suffolk. April 2, 1906. — June 25, 1906.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Eminent Domain. Limitation, Statutes of. Damages. Deed. Powers.

Where private property is taken by the right of eminent domain for a public purpose, although the Constitution requires just compensation to be made to the owner, the period of limitation within which the remedy given is to be exercised is within the control of the Legislature, and if a landowner fails to take advantage of such a remedy within the time limited his claim for damages is lost.

St. 1902, c. 543, amended by St. 1905, c. 224, relating to the improvement of the State House and to the height of buildings on Beacon Street and Bowdoin Street in the city of Boston, providing compensation to the owners of land within certain territorial limits whose property was damaged more than it was benefited by the improvement of the State House, the limitation of the height of buildings and by the other improvements connected therewith, did not revive any rights under St. 1899, c. 457, relating to buildings within an area west of the State House, as amended by St. 1901, c. 417, and as extended by St. 1901, c. 525, § 4, to include certain estates east of the State House grounds, but constituted a new taking, and a person whose right to damages under the earlier statutes had expired by limitation before he filed a petition under St. 1902, c. 543, as amended by St. 1905, c. 224, on obtaining a judgment for damages upon his petition is entitled to interest only from June 28, 1902, the date of the only taking for which his petition can be maintained.

A testator devised to his adopted daughter "the use or rent of my mansion house and land . . . for and during her natural life with the right to dispose of the same as she shall think proper from the time of her death." There was no devise over. The will provided that the executor within two years from the death of the testator should dispose of the balance of his estate to a charity named. The testator's adopted daughter during her lifetime appointed the property to a certain person in trust to convey and dispose of it as she should direct, and this person by her direction conveyed it to her in fee simple. *Held*, that by the deeds the devisee became seised of the property in fee, and that on a petition for damages for a property right taken by eminent domain under statutory authority she was entitled to the whole award.

PETITION, filed May 4, 1905, by Lydia N. Raymond of Newburyport, under St. 1902, c. 543, as amended by St. 1905, c. 224, to recover the amount by which the lot on the corner of Park Street and Beacon Street in Boston was damaged more than it was benefited by the limitation of the height of buildings

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to seventy feet, the laying out of the park east of the State House, and the other improvements connected therewith.

In the Superior Court the case was submitted to *Gaskill*, J. upon agreed facts. The petitioner acquired title to the property under the following clause in the will of Matthias P. Sawyer: "I give and bequeath to my adopted daughter Lydia N. Raymond wife of Curtis B. Raymond of Boston the use or rent of my mansion house and land on the corner of Beacon and Park Streets in the City of Boston for and during her natural life with the right to dispose of the same as she shall think proper from the time of her death." There was no devise over. The will near the end contained the following provision: "I direct that my Executor within two years from my death dispose of the balance of my estate to the Massachusetts General Hospital."

On December 6, 1905, after this petition was brought but before judgment, the petitioner appointed the property to Moorfield Storey in trust to convey and dispose of it as she should direct, and on the same day by her direction he conveyed it to her in fee simple.

The judge gave judgment for the petitioner in the sum of $41,447.50, which consisted of the amount of the petitioner's damages, $32,500, with interest from June 19, 1901. The judgment provided that this sum should be paid to a trustee appointed by the Probate Court under R. L. c. 48, § 19. Such a trustee was appointed, and appeared in the suit.

The Commonwealth appealed from the judgment on the ground that the court erred in allowing interest from June 19, 1901, and that it should have been allowed only from June 28, 1902.

In the Superior Court the Commonwealth also contended that the petitioner could recover nothing beyond the damage to a life estate in the property, but waived this point on appeal.

The petitioner appealed from so much of the judgment as provided that the damages should be paid not to her but to a trustee.

D. Malone, Attorney General, *W. P. Hall & F. T. Field*, Assistant Attorneys General, for the Commonwealth.

E. R. Thayer & J. L. Motley, for the petitioner.

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BRALEY, J. While under the right of eminent domain private property cannot lawfully be taken by the sovereign power without awarding just compensation to the owner unless he has assented, yet the public purpose and time of such appropriation as well as the period in which any remedy for the recovery of damages is to be exercised are in its exclusive control, and failure by the landowner to take advantage of the remedy works a forfeiture of any claim for damages. *Talbot* v. *Hudson*, 16 Gray, 417, 424. *Haskell* v. *New Bedford*, 108 Mass. 208, 214. *Burnett* v. *Commonwealth*, 169 Mass. 417, 425.

By the St. of 1899, c. 457, the height of buildings within a small area west of the State House was restricted, and St. 1901, c. 525, § 4, by amendment extended the restriction to include certain estates lying easterly of the building and grounds, among which was that of the petitioner. It was provided by the first named statute that petitions for damages should be brought within one year from June 2, 1899, the date of its passage, and this period was subsequently enlarged to three years by St. 1901, c. 417, but as the present suit was not begun until May 4, 1905, it cannot be maintained unless subsequent legislation either conferred a similar right or removed this limitation. *Danforth* v. *Groton Water Co.* 176 Mass. 118, 120. Upon the expiration of this limitation, then came St. 1902, c. 543, re-enacting the restriction as to the height of buildings which might be erected on the petitioner's estate, but this act granted a period of two years from June 28, 1902, when it took effect, within which a petition might be prosecuted. St. 1905, c. 224, subsequently extended this time for a further term of one year, and as these two statutes are to be construed together they make the limitation three years from the date of the enactment of St. 1902, c. 543. *Danforth* v. *Groton Water Co.* 178 Mass. 472. *Dunbar* v. *Boston & Providence Railroad*, 181 Mass. 383. *Rogers* v. *Nichols*, 186 Mass. 440, 443. It is manifest from the entire series of amendatory statutes so far as they relate to the remedy, that at least the petitioner and probably other owners of the estates which had been injuriously affected by the primary act as amended, inadvertently failed to take advantage of its provisions, and thus had lost their right to recover compensation. *Geraghty* v. *Boston*, 120 Mass. 416. To remedy what

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may have been deemed an injustice, and to enlarge and more specifically define the restricted area, instead of a separate act granting a further extension of time under the original condemnation, the Legislature by St. 1902, c. 543, § 1, again proceeded explicitly to condemn these estates, but with a provision not before found, that any betterment which had accrued by reason of the general improvement should be set off in the assessment of damages. That this was intended as a fresh taking is shown not only by the different provisions concerning the ascertainment of damages, but by the inclusion of other estates in the vicinity. St. 1902, c. 543, § 2. If the original taking for any reason had been considered of doubtful validity, or the provision for the payment of damages was considered as not being sufficiently favorable to the respondent, there can be no serious question that the Commonwealth could proceed independently under the subsequent statute without such action being treated as reviving the petitioner's right to recover under a former taking which had been barred by the lapse of time, as a second condemnation without a proviso to that effect did not revive the former right of action. See *Crompton Carpet Co.* v. *Worcester*, 123 Mass. 498, 504. But it is obvious there can be no entry upon the premises in the sense that when land is taken for the use of the public physical possession at some period in the proceedings becomes requisite as in the laying out of public ways, and where interest on the damages awarded or recovered by suit is to be computed only from the date of entry. *Edmands* v. *Boston*, 108 Mass. 535. *Pegler* v. *Hyde Park*, 176 Mass. 101. And to compensate the petitioner interest must be allowed from June 28, 1902, which is the date of the only taking under which the petition can be maintained. *Old Colony Railroad* v. *Miller*, 125 Mass. 1. *Imbescheid* v. *Old Colony Railroad*, 171 Mass. 209. *Hay* v. *Commonwealth*, 183 Mass. 294, 295, and cases cited.

If the question of the measure of damages is thus determined, the remaining inquiry concerns the title, and while the respondent makes no contention that the petitioner is not entitled to the entire sum absolutely, the judgment from which the appeal is taken provides for the appointment of a trustee under R. L. c. 48, §§ 17, 19, because the petitioner was held to be only a tenant

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for life. By the first clause of the will of Matthias P. Sawyer he devised to her the mansion house and land, which are the premises described in the petition, "for and during her natural life with the right to dispose of the same as she shall think proper from the time of her death." When this will was admitted to probate Rev. Sts. c. 62, § 4, now R. L. c. 135, § 22, provided that in a devise of lands all the estate of the devisor therein should pass, unless by his will it clearly appeared that he intended to convey a less estate. After this gift there is no devise over, and the language of the residuary clause, that within two years after the testator's death his executor should dispose of the "balance" of the estate to "The Massachusetts General Hospital," is inconsistent with a construction that he intended to include this property which previously had been given to his daughter. *Baker* v. *Bridge*, 12 Pick. 27, 31. *Joslin* v. *Rhoades*, 150 Mass. 301. *Bassett* v. *Nickerson*, 184 Mass. 169. But it is unnecessary to decide whether a fee passed, for in any event she took a life estate with a power of disposal by deed or by will. *Kimball* v. *Sullivan*, 113 Mass. 345. *Kent* v. *Morrison*, 153 Mass. 137, 139. *Dana* v. *Dana*, 185 Mass. 156. The phrases "during her natural life" and "from the time of her death," which were used to express his purpose, have no larger signification than if the testator had said that the estate was "to be kept and retained by her as long as she shall live," and this language was held in *Todd* v. *Sawyer*, 147 Mass. 570, where a similar devise was made to be insufficient to prevent the devisee from conveying an absolute title in fee. The power given being unrestricted the devisee could sell the property to whomsoever she pleased, and when received the proceeds became her individual property. *Kent* v. *Morrison*, *ubi supra*. She chose to convey to an intermediary upon a trust for her benefit, and he reconveyed to her. This was a valid execution of the power, for being the donee she could convey, if she chose, directly to herself in fee. By either form of conveyance she would become seised not as grantee of herself, but as the person designated by her in the exercise of the power conferred by the testator, from whom upon its execution she would derive title. *Hall* v. *Bliss*, 118 Mass. 554, 559, and authorities there cited. *Look* v. *Kenney*, 128 Mass. 284.

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The judgment awarded by the Superior Court having included interest from June 19, 1901, the date of the passage of St. 1901, c. 525, must be reversed, and judgment, without the appointment of a trustee, is to be entered for the petitioner in the sum of $32,500, with interest at the legal rate from June 28, 1902.

So ordered.

MILFORD WATER COMPANY *vs.* INHABITANTS OF HOPKINTON.

Middlesex. December 14, 1905. — July 5, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Tax, Exemption, Abatement. *Corporation. Public Service Corporation. Estoppel. Milford Water Company. Hopkinton.*

If a public service corporation, incorporated for the purpose of supplying the inhabitants of a certain town with water and given by statute authority to take and hold land in another town for the purposes named in its charter, acquires for these purposes either by purchase or by a taking under the authorizing statute land which it has the right to take under the statute, such land so far as it is necessary and proper for the purposes of the charter of the corporation is exempt from taxation.

The Milford Water Company, incorporated by St. 1881, c. 77, for the purpose of furnishing the inhabitants of Milford with water, and authorized by St. 1882, c. 188, to take and hold any real estate south of a certain street in the town of Hopkinton necessary and proper for the purpose of supplying the town of Milford with water, acquired by a taking under the act, or in part by purchase ratified by a subsequent taking, land in Hopkinton south of the street named in the act, and constructed thereon a dam and reservoir which it held and used for the purposes of its charter. *Held*, that the real estate of the water company thus acquired and used was not subject to taxation by the town of Hopkinton.

A public service corporation may maintain a petition under R. L. c. 12, § 73, for the abatement of a tax assessed upon land held by it under statutory authority for a public purpose and thus exempt from taxation, although the result of granting the petition will be to abate the whole of the tax.

A public service corporation is not estopped from maintaining a petition under R. L. c. 12, § 73, for the abatement of a tax assessed upon land held by it for a public purpose and thus exempt from taxation by the fact that it included the land in the list of taxable property which it returned to the assessors.

PETITION, filed December 5, 1904, under R. L. c. 12, § 73, for an abatement of certain taxes assessed upon the property of the petitioner in the town of Hopkinton for the year 1904.

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On appeal from a refusal of the abatement by the assessors, the case was tried in the Superior Court before *Hardy*, J. It appeared that all the preliminary statutory requirements to entitle the petitioner to an abatement had been complied with.

The petitioner was incorporated by St. 1881, c. 77, "for the purpose of furnishing the inhabitants of Milford with pure water for the extinguishment of fires, and for domestic and other purposes, with all the powers and privileges, and subject to all the duties, restrictions and liabilities set forth in the general laws which now are or may hereafter be in force regulating such corporations."

Section 2 of the act authorized the petitioner to take and hold water from any streams and springs in Milford, and to construct dams and lay water pipes, and to take and hold real estate for the preservation and purity of its water supply in Milford, and do the other acts necessary for the establishment of a municipal water supply.

Section 9 of the act is as follows:

"The town of Milford shall have the right at any time during the continuance of the charter hereby granted, to purchase the corporate property and all the rights and privileges of said company, at a price which may be mutually agreed upon between said corporation and the said town of Milford; and the said corporation is authorized to make sale of the same to said town. In case said corporation and said town are unable to agree, then the compensation to be paid shall be determined by three commissioners, to be appointed by the supreme judicial court upon application of either party and notice to the other, whose award, when accepted by said court, shall be binding upon both parties. And this authority to purchase said franchise and property is granted on condition that the same is assented to by said town by a two-thirds vote of the voters present and voting thereon, at a meeting called for that purpose."

The first two sections of St. 1882, c. 188, are as follows:

"Section 1. The Milford Water Company may take and hold any real estate situated south of Granite Street in the town of Hopkinton, necessary and proper for the purpose of supplying the town of Milford with water, as provided by chapter seventy-seven of the acts of the year eighteen hundred and eighty-one,

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and for the preservation and purification of such water and for forming any dams or reservoirs to hold the same.

"Section 2. Said corporation shall, within sixty days after the taking of any land under the provisions of this act, file and cause to be recorded in the registry of deeds for the southern district of the county of Middlesex a description of the land so taken, sufficiently accurate for identification, and stating the purposes for which it is taken; and the title of the land so taken shall vest in said corporation. Any person whose property is injured in any way by any act of said corporation, and who fails to agree with said corporation as to the amount of damages, may have the same assessed and determined in the manner provided when land is taken for a highway. Any person whose land is thus taken or affected may apply as aforesaid within three years from the time the land is actually taken, and not thereafter; and no suit for injury done under this act shall be brought after three years from the date of the alleged injury."

In 1882 the petitioner built a dam and reservoir in the town of Hopkinton, from which water flowed in the natural channel of the stream to a point in Milford, where from a pumping station water was taken into the mains of the petitioner and distributed to the consumers. In 1901 the dam was raised ten feet, flowing a much larger area. All the land thus used and occupied by the petitioner in the town of Hopkinton, whether previously acquired by deed or not, was included by the petitioner on May 1, 1904, in a taking under the authority of eminent domain conferred upon it by the two statutes above named, its ownership on that date being one hundred and fifty-eight and four-tenths acres.

The judge found and ruled as follows:

"The fair cash value of the dam on May 1, 1904, was twelve thousand dollars.

"The remaining land of the petitioner in Hopkinton was one hundred and fifty-eight and four-tenths acres in area and the value of such land apart from the dam if it had not been devoted to the uses of the water supply, was at that date, thirty dollars an acre.

"I find, however, the cash value of the latter parcel of land in connection with its use for a water supply has been enhanced

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by reason of the purposes for such water supply to which it has been devoted, and for which it is necessary under the limitations and provisions of the statute, to the amount of seventy-five dollars an acre. In accordance with such finding the value of the land and dam was twenty-three thousand eight hundred and eighty dollars.

"Inasmuch as the petitioner admitted in its schedule returned to the respondent that the area of the land was one hundred and seventy-five acres and both parties acted on a mutual understanding as to such admission and because of the pleadings in the case, I find the petitioner is not entitled to an abatement by reason of the error as to the area of the land assessed.

"I rule that such enhanced value created by the uses for a water supply is incident to the land herein assessed. I therefore find that the valuation of the assessors of the respondent is reasonable and the prayer of the petitioner is denied, with costs."

The petitioner alleged exceptions, raising the questions which are dealt with in the opinion.

A. P. Rugg, (*W. Williams* with him,) for the petitioner.

C. F. Choate, Jr., (*F. C. Pillion* with him,) for the respondent.

HAMMOND, J. The principal question is whether the real estate is exempt from taxation. The petitioner does not base the claim of exemption upon any express provision of statute, nor does it deny the power of the Legislature to tax the property. But it contends that the general provisions of our statutes for the taxation of real estate are not applicable where the estate is taken by right of eminent domain, (or, being subject to be so taken, has been purchased,) for a public purpose and is being used for that purpose.

The leading case upon this subject in our reports is *Worcester* v. *Western Railroad*, 4 Met. 564. The railroad company had been authorized to take a strip of land five rods wide, (and, in certain cases not here material, to a greater width,) and to purchase such land outside of said strip as might be proper and necessary in carrying on the business for which it was incorporated. It was said by this court that it was manifest upon an inspection of the charter that "the establishment of that great thoroughfare is regarded as a public work, estab-

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lished by public authority, intended for the public use and benefit," and it was held that to the extent of the land which the corporation could take by right of eminent domain the real estate of the corporation was exempt from taxation so long as used for the public purpose. It was further held that this was the limit of exemption. The rule thus laid down was approved in *Boston & Maine Railroad* v. *Cambridge*, 8 Cush. 237. In *Wayland* v. *County Commissioners*, 4 Gray, 500, the same principle was applied where land situated in the town of Wayland had been taken by the city of Boston under St. 1846, c. 167, for supplying the city with pure water. Thomas, J., in giving the opinion of the court, says: "We think the question substantially settled by the decision of this court in the case of *Worcester* v. *Western Railroad*."

The principle seems to be that where land is taken (or purchased when it could have been taken) and held for a public purpose, it shall be exempt from taxation in the absence of any express statutory provision to the contrary. It has been applied to a gravel pit owned by one city within the limits of another, and to land taken for highways. *Somerville* v. *Waltham*, 170 Mass. 160. *Lancy* v. *Boston*, 186 Mass. 128, and cases cited. *Boston* v. *Boston & Albany Railroad*, 170 Mass. 95, and cases cited. In the case last cited Knowlton, J. said: "But the exemption of property appropriated to a public use is not founded upon an express provision of any statute, but rests upon general principles of propriety, justice, and expediency, which are applicable alike to every kind of taxation."

The petitioner, the Milford Water Company, was incorporated "for the purpose of furnishing the inhabitants of Milford with pure water for the extinguishment of fires, and for domestic and other purposes"; and to that end was authorized to take, hold and convey the water of any spring or stream in Milford, and to take and hold by purchase or otherwise any land in the town of Milford or in the town of Hopkinton south of Granite Street which might be proper and necessary. There was a provision in the act of incorporation providing that the town of Milford should have the right to purchase the corporate property, the price to be agreed upon by the parties or, failing an agreement, by three commissioners. St. 1881, c. 77. St. 1882, c. 188.

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The use is public. As said by Thomas, J. in *Wayland* v. *County Commissioners*, *ubi supra*, "It would be difficult . . . to find any class of cases in which the right of eminent domain is more justly or wisely exercised than in provisions to supply our crowded towns and cities with pure water, provisions equally necessary to the health and the safety of the people." The petitioner was engaged in ministering to this use, and for this purpose it was empowered to take land by right of eminent domain. It could take land for no other purpose. We do not understand the respondent town to deny that the real estate in question was held and used by the petitioner under its act of incorporation. If the estate had been held by the town of Milford, then the case would have been completely covered by the last case above cited.

It is true that by St. 1893, c. 352, (now R. L. c. 12, § 10,) it was provided in substance that although property held by a city or town in another city or town for the purpose of a water supply, if yielding no rent, should be exempt from taxation, yet that the city or town so holding should pay to the city or town in which the land was situated a certain sum dependent upon the value of the land exclusive of buildings or other structures; yet it is manifest that this sum is not technically a tax, but simply a substitute for a tax. The principle of the decision in *Wayland* v. *County Commissioners*, *ubi supra*, is still the law of the Commonwealth so far as respects the question of taxation.

It can make no difference that the party which is empowered to exercise the right of eminent domain and to perform this public trust is a corporation other than municipal. The true test is whether it is engaged in the administration of a public trust with power to take land for that purpose. It is the character of the use to which the property is put, and not of the party who uses it, that settles the question of exemption from taxation. *Worcester* v. *Western Railroad*, *ubi supra*. *Wayland* v. *County Commissioners*, *ubi supra*. *Boston* v. *Boston & Albany Railroad*, 170 Mass. 95. *Essex County* v. *Salem*, 158 Mass. 141. The case is clearly distinguishable from cases like *Boston Water Power Co.* v. *Boston*, 9 Met. 199, and *Commonwealth* v. *Lowell Gas Light Co.* 12 Allen, 75. In the latter case Bigelow, C. J.,

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in speaking of the contention that the defendant was a quasi public corporation like a turnpike or a railroad corporation, uses this language: "We fail to see that the defendants can be properly regarded as a corporation of this character. No public duty is imposed upon them, nor are they charged with any public trust. They are authorized to make and distribute gas for their own profit and gain only. They are not bound to sell and dispose of it to any one, either for public or private use or consumption. . . . Nor is any power conferred upon them to take private property, not previously appropriated to a public use, for the purpose of exercising and enjoying their franchise."

The petitioner in this case is making a public use of property obtained by right of eminent domain. It cannot unreasonably refuse to furnish water to an applicant. *Turner* v. *Revere Water Co.* 171 Mass. 329. It is administering a public trust just as the town of Milford would be administering the same trust, should it exercise its right to purchase the property. There is no express statute subjecting land so used to taxation. Under the principles laid down in the cases hereinbefore cited, the provisions of the general tax acts do not apply. The land is therefore exempt from taxation, and that is so even if some or all of the land was acquired by purchase. It is not material whether the land be taken under statutory proceedings. If it could have been so taken, and by an agreement between the corporation and the landowner these proceedings are dispensed with and the title is conveyed by deed to the corporation, the land so far as material to the question before us is to be regarded as if taken by right of eminent domain. It is true that under this decision the petitioner is left in a more favorable position as to taxation than that in which a town using land for a similar purpose is left under R. L. c. 12, § 10, and more favorable also than that of an aqueduct company, incorporated under the general laws, which cannot take property by right of eminent domain. If this rule of law affects the public interests unfavorably the Legislature can provide a remedy.

It is argued by the respondent that the question whether the property is exempt is not open upon this petition. The petition is plainly brought under R. L. c. 12, § 73. This section provides that the assessors, if they find that the applicant for

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abatement is taxed "at more than his just proportion, or upon an assessment of any of his property in excess of its fair cash value," may make a reasonable abatement. While it is true that the language of this section gives some support to the idea that the assessors acting under it cannot wholly abate a tax, and while the person taxed, upon paying the tax under protest, may maintain an action of contract to recover it back, or perhaps successfully defend against any proceedings brought for its collection, (see *Harrington* v. *Glidden*, 179 Mass. 486, and cases therein cited,) still we see no reason why the statute may not be broad enough to cover a case like this. There are obvious public reasons why it is better that questions like this should be settled by the assessors upon petition for abatement, not the least potent of which is that the applicant for an abatement must first make to the assessors a sworn statement of his property liable to taxation. Again, it is more convenient for the applicant that the question whether he is liable at all, and, if so, to what extent, should be settled in one proceeding. In view of the history of the legislation we can have no doubt that it was the intention of the Legislature by this proceeding to make provision for the settlement of the question of the validity of the whole or any portion of the tax. The petition follows the language of the statute, and is broad enough to justify any action proper under the statute.

It is further argued that by including in its list to the assessors this land as taxable property the petitioner is now estopped to set up the claim that it is not taxable. But this position is untenable. *Dunnell Manuf. Co.* v. *Pawtucket*, 7 Gray, 277. *Charlestown* v. *County Commissioners*, 109 Mass. 270. *Moors* v. *Street Commissioners*, 134 Mass. 431.

It becomes unnecessary to discuss the other exceptions raised upon this record.

Exceptions sustained.

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FREDERICK ESTABROOK & others *vs.* GEORGE A. WOODS & another.

Suffolk. December 15, 1905. — September 4, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Partnership. Agency. Contract, Construction.

One agreed in writing to lend to another $200 for three years with interest at the rate of six per cent per annum upon the security of a chattel mortgage on the stock of goods and fixtures of a cigar store in a certain place of which the lender was to procure a lease for the borrower. The lender also agreed to secure for the borrower a stock of cigars and tobacco to an amount of not more than $250, and was to be allowed interest at the rate of six per cent per annum on payments for this purpose until repaid by the borrower, the payments to be secured by the chattel mortgage. The borrower was to devote his time and attention to carrying on the cigar store in question, and from the proceeds of the business was to pay, first, the expenses of the business, second, the interest due to the lender, third, to take for his own use any balance not exceeding $20 per week, fourth, to pay one half of the remaining balance or net profit to the lender, keeping the other half for his own use, and also, when he had repaid all sums advanced by the lender, thereafter until the expiration of three years from the date of the lease of the cigar store, he was to pay to the lender one quarter of the net profits instead of one half. Goods and fixtures were obtained to fit up a cigar store in accordance with this contract and were mortgaged by the borrower to the lender to secure about $530 advanced by him under the contract. The lender never held himself out to any one as a partner of the borrower. An action of contract was brought against the lender and borrower as copartners for a balance of about $370 alleged to be due to the plaintiff for cigars and tobacco sold and delivered to the borrower for the business carried on under the contract. *Held*, that the lender was not liable as a partner, not being entitled under the contract to share in the profits as such, but only entitled to sums of money, to be determined by the amount of the profits, as a compensation for what he did and the risk that he ran in furnishing the money at six per cent interest. *Held, also*, that for the same reason the lender was not liable as an undisclosed principal for whom the borrower was acting as an agent.

CONTRACT on an account annexed for a balance of $369.68 alleged to be due for cigars and tobacco sold and delivered to the defendants, George A. Woods and Alpheus Bigelow, who were alleged to be copartners doing business at 4 Pemberton Square in Boston, with interest from February 7, 1902. Writ in the Municipal Court of the City of Boston dated July 18, 1902.

On appeal to the Superior Court the case was tried before *Schofield*, J. The defendant Bigelow was defaulted, and the

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defendant Woods alone defended the case on the ground that he was not a partner. It appeared that on March 9, 1901, Woods and Bigelow executed an agreement in writing, all the material parts of which are quoted in full in the opinion, where also all other material facts are stated.

At the close of the evidence the defendant Woods asked the judge to rule:

1. That upon all the evidence the plaintiffs are not entitled to recover as against the defendant Woods.

2. That the defendant Woods did not, by the agreement made March 9, 1901, become a partner of the defendant Bigelow.

The judge declined to rule as requested, and stated that upon all the evidence there was no question of fact in dispute between the parties, and ruled that upon all the evidence the defendant Woods was liable as a partner, or, if not as partner, as an undisclosed principal, and directed a verdict for the plaintiffs, which was returned by the jury in the sum of $414.04. The defendant Woods excepted, and the judge reported the case for determination by this court. If the ruling and direction could be sustained on the ground that Woods was a partner, judgment was to be entered on the verdict. If Woods could be held only as an undisclosed principal, the verdict was to be set aside and the case was to stand for trial, as the defendant contended that he was taken by surprise by the ruling of the judge upon this point, and stated that he had additional evidence to offer upon it. If the case should be ordered to stand for trial, the plaintiffs might apply to amend their declaration if so advised. If the defendant Woods could not be held either as a partner or as an undisclosed principal, the verdict was to be set aside and judgment was to be entered for the defendant Woods.

G. C. Coit, for the defendant Woods.

C. C. Bucknam, for the plaintiffs.

KNOWLTON, C. J. The principal question in this case is whether the defendant Woods is liable as a partner with the defendant Bigelow for goods sold by the plaintiffs, for the price of which this action is brought. Woods was the party of the first part and Bigelow the party of the second part in a contract in writing, the substantive portions of which are as follows:

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"1. The party of the first part agrees to loan the party of the second part two hundred dollars for three years, with interest payable semi-annually at the rate of six per cent per annum, said loan to be secured by a chattel mortgage of the stock of goods and fixtures in a cigar store to be located in the building at the southerly corner of Pemberton Square and Tremont Street in Boston in the County of Suffolk and said Commonwealth.

"2. The party of the first part agrees to secure for the party of the second part a stock of cigars and tobacco to the amount of not more than two hundred and fifty dollars (and said stock of goods may at the option of party of the first part be obtained for said store by said party of the first part by credit or by cash payments); and upon payments by the party of the first part for such goods he shall be allowed by said party of the second part interest at the rate of six per cent per annum on such payments until the same are repaid by the party of the second part, and the same shall be secured by the mortgage above mentioned.

"3. This agreement is conditioned upon the party of the first part being able to secure for the party of the second part a lease for three years of a store to be constructed at the corner of the said premises at a yearly rental of four hundred and eighty dollars and shall guarantee said lease.

"4. The party of the second part agrees to conduct a cigar and tobacco store in said premises and to devote his time and attention to the conduct of the business and he agrees hereby that he will not engage in any other business, or occupation until after six o'clock P. M. during the term of said lease or so long as the party of the first part shall be liable thereon.

"5. He shall from the proceeds of the business first pay the expenses incurred in the conduct of the business, and maintain the stock of goods; second, pay interest due party of the first part; third, take on account of his services for his own use, any balance not exceeding the sum of twenty dollars per week; fourth, pay one half of the remaining balance, i. e. the net profit, to party of the first part, and keep the remaining one half for his own use. . . .

"6. It is agreed that after July 1st, 1902, whenever the party of the second part shall have repaid all sums advanced by the

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party of the first part, that thereupon and thereafter in lieu of said one half of the net proceeds as hereinbefore provided the party of the second part shall pay the party of the first part one quarter of the net profits until the expiration of three years from the date of the lease of said premises."

Property was obtained to fit up a cigar store in accordance with this contract, and it was mortgaged by Bigelow to Woods to secure the payment of a note of $533.53, the consideration of which was the liability of Bigelow to Woods under the contract.

There was no evidence that the defendant Woods ever held himself out to the plaintiffs or any one else as a partner of Bigelow, and the question is whether this contract made him a partner in the business carried on under it. That depends upon the actual relation of Woods to the business. If two persons connected in business have such rights and interests as to make them in fact partners, no contract modifying or limiting the liability of either partner, or increasing the liability of the other as between themselves, would have any effect upon the rights of third persons to hold both upon proper contracts made by either in the partnership business. Apart from the liability which one may create by holding himself out as a partner when he is not one, this is the true meaning of those cases which seem to recognize a difference between being partners *inter sese* and being partners as to third persons. In fact, the conditions referred to constitute the persons actual partners, although they may have contracted with one another to modify, as between themselves, some of the usual liabilities of partners.

When there is an arrangement between two persons that one of them shall receive a part of the profits of a business conducted by the other, the usual test to determine whether he is a partner, liable for debts, is to ascertain whether he has a share or interest in the profits as profits, or whether his interest in the profits is merely as a measure of his compensation for something that he does or furnishes under a contract. By the application of this test most if not all of the following cases can be reconciled. *Denny* v. *Cabot*, 6 Met. 82. *Pratt* v. *Langdon*, 12 Allen, 544. *Holmes* v. *Old Colony Railroad*, 5 Gray, 58. *Bradley* v. *White*, 10 Met. 303. *Pettee* v. *Appleton*, 114 Mass. 114. *Dame* v.

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Kempster, 146 Mass. 454. *Meehan* v. *Valentine*, 145 U. S. 611. *Cox* v. *Hickman*, 8 H. L. Cas. 312. For one to share in the profits as profits, within the true meaning of the cases, is to stand in such relations to the business that the profits, or a share of them, are in his ownership as they accrue. He must have a proprietary interest in each dollar of profits as it is earned, so that he then has a right of possession or control of it for the purpose of retaining his share. This involves an ownership of an interest in the business that produces the profits. Through this comes the implied agency on which the liability of a partner for the contracts of his copartners is founded.

The fair interpretation of the contract in the present case is that Woods was to furnish Bigelow capital to establish and carry on the business for himself, and as this would be a pretty risky investment, he was to receive from Bigelow as compensation, not only interest on the amount invested, at six per cent per annum, but also, for a certain period, he was to have one half of the net profits, reckoning Bigelow's time at twenty dollars per week, and for a certain longer time he was to have one quarter of the net profits. From beginning to end, Bigelow was to be the sole debtor for everything procured for the business, or used in it. Woods was to have security by mortgage from Bigelow for his entire investment and liability. The only interest that he had in the success of Bigelow's enterprise was to get back the money that he furnished, and to get for the chance that he took something more than six per cent interest on his loan, namely, a sum of money to be determined by the amount of the net profits for the term of three years. If Bigelow failed to pay him according to the agreement, his only remedy was under his mortgage, or to sue for the amount, as anybody else would sue for a liability under a contract. He had no right to take control of the business or of the profits earned in it, or to interfere in the management of it in any way. Under the cases cited above, he was not a partner, and was not liable for debts contracted by Bigelow in conducting the business.

The same considerations show that he was not an undisclosed principal for whom Bigelow was acting as an agent.

Judgment for the defendant Woods.

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ABRAHAM BILAFSKY *vs.* CONVEYANCERS TITLE INSURANCE COMPANY & others.

Suffolk. March 7, 1906. — September 4, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Conspiracy. Deceit. Practice, Civil, Verdict, Exceptions.

In an action of tort alleging a conspiracy, if the gist of the action is not the conspiracy but a tort which it is alleged that the defendants committed jointly, the acts alleged to have been done by the conspirators are not actionable unless they would have been actionable had they been done by the defendants severally.

Where the parties to an oral contract differ as to what are their respective rights under it, and one of the parties to the contract, relying upon the soundness of the claim of the other party based on his assertion as to what the contract is in fact or in law, makes a voluntary payment of money to that party, and afterwards it turns out that the claim was unsound, the party who paid the money cannot maintain an action of tort for deceit against the party who made the claim which he chose to admit.

Where in a single count of the declaration in an action of tort damages are claimed under separate independent items and a general verdict is returned for the plaintiff on the whole count in a round sum, if the presiding judge refused to give a ruling requested by the defendant which was correct and material as to some of the items the verdict cannot stand and an exception to the refusal of the ruling must be sustained.

TORT OR CONTRACT, the first count being in tort and the second in contract on an account annexed. Writ dated November 18, 1898.

At the trial in the Superior Court before *Aiken*, C. J. the plaintiff, having been required by the court to elect, elected to go to the jury upon the first count, and a verdict was ordered for the defendants upon the second count.

The first count contained allegations that the defendants Bowditch, Edes and the Conveyancers Title Insurance Company entered into a conspiracy and conspired to deceive and defraud the plaintiff in the matter of the accounts and accounting existing and continuing between him and them, and carried into effect their combination to deceive, oppress and defraud him in the accounts and accounting by false representations and statements, that he believed the representations to be true, acted thereon and was defrauded of the following sums:

First Item. The sum of $2,350 on certain transactions relat-

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ing to a loan of money by the defendant company for the construction of certain buildings on Westland Avenue in Boston.

Second Item. The sum of $4,312.50 on certain transactions relating to the loan of money by the defendant company for the construction of certain buildings on Beacon Street in Brookline.

Third Item. The sum of $296.68 on interest represented to be due to the defendant Bowditch.

Fourth Item. The sum of $1,000 on brokerage commission represented to be due to the defendant Bowditch.

Fifth Item. The sum of $405 on interest represented to be due to the defendant company.

Sixth Item. The sum of $170.80 on insurance premium payments represented to be due to the defendant company.

The facts in regard to the several items are stated in the opinion.

At the close of the evidence each of the defendants asked the Chief Justice to make the ruling, which is quoted in the opinion, that there was no evidence to warrant a finding in favor of the plaintiff against that defendant alone or with either or both of the other defendants.

The Chief Justice instructed the jury that it was competent for them to find for the plaintiff the following sums and no more:

Under Item "First," ($2,350 reduced, by admission, at the trial, to $1,450)	$1,450.
Under Item "Second"	4,312.50
" " "Third"	296.68
" " "Fourth"	1,000.
" " "Fifth"	405.
" " "Sixth"	170.80
A total of	$7,634.98

with interest from the date of the writ, November 18, 1898, to the date of the verdict.

The jury returned a general verdict for the plaintiff in the sum of $10,101.98, which afterwards by requirement of the Chief Justice was reduced to $9,089.35. The defendants alleged exceptions, inserting for the purpose of shortening the record the admissions which are quoted in the opinion.

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H. W. Chaplin, (*C. Warren* with him,) for the defendants.

J. C. Ivy, (*C. S. Ensign, Jr.* with him,) for the plaintiff.

LORING, J. This is one of those cases where the allegations as to conspiracy are at most allegations that what is alleged to have been done was done jointly. In such a case the acts alleged to have been done by the conspirators are not actionable unless they would have been actionable had they been done by the defendants severally. *Matthews* v. *Bliss*, 22 Pick. 48. *Parker* v. *Huntington*, 2 Gray, 124. *Hayward* v. *Draper*, 3 Allen, 551. *Randall* v. *Hazelton*, 12 Allen, 412. *Bowen* v. *Matheson*, 14 Allen, 499. *Rice* v. *Coolidge*, 121 Mass. 393. *Boston* v. *Simmons*, 150 Mass. 461. *May* v. *Wood*, 172 Mass. 11. *Converse* v. *United Shoe Machinery Co.* 185 Mass. 422.*

The plaintiff in his declaration counts on false and fraudulent representations made by the defendants, on which he relied and was defrauded out of the six items there set forth.

Laying aside for the moment two sums of $3,000 and $2,000 (part of item two), for which the plaintiff gave the defendant corporation a check for $5,000, and possibly the sum of $250, for which the plaintiff gave a check in connection with the third item, the way, and the only way, in which the plaintiff undertook to make out a case in proof of the allegations of the declaration was by showing that the defendants claimed the sums in question as due under the contracts which had been made between the defendant corporation and the plaintiff, and in one case between the plaintiff and the defendant Bowditch, and that the difference between the plaintiff and the defendants was not a matter of accounting under a contract, but a difference as to what the contracts made were.

We will take the several items in their order. Item one grew out of a construction loan and a subsequent time loan made by the defendant corporation to the plaintiff, to enable him to erect two apartment houses on a lot of land on Westland Avenue, Boston. The defendant corporation advanced to the plaintiff under the construction loan $60,000, in which was included $2,500 which the defendants testified was a lump sum agreed upon for the use of the money so lent. For making the notes given for the time loan carry interest at four and one half per

* See *Pickett* v. *Walsh*, *post*, 572.

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cent instead of five per cent (which was the defendants' original offer), the defendants contended that the plaintiff agreed to pay $1,800. The defendants also contended that the construction loan was limited to $60,000, and that the plaintiff agreed to pay $250 to the defendant corporation for making advances beyond that amount. The plaintiff contended on the other hand that he was to pay four and one half per cent on the money lent. The difference between the three sums claimed by the defendants and the interest at the rate alleged by the plaintiff to be the rate agreed upon made up the first item of $1,450 in amount.

The second item is similar to the first, apart from the giving of the $5,000 check already referred to. The sums involved in this item arose out of a construction loan and a time loan to enable the plaintiff to build two apartment houses on a lot of land on Beacon Street in Brookline. The defendants' contention was that for the use of the first $60,000 lent on the construction loan the corporation was to be paid the lump sum of $2,500; and for advances under the construction loan beyond the amount to which that loan was originally limited, the lump sum of $3,000; and for extending the construction loan and making it a time loan, a lump sum of $2,000. Here again the plaintiff's contention was that the agreement was that he was to pay interest at the rate of four and one half per cent; and the difference between the two makes the second item, amounting to $4,312.50.

The third item (apart from a question arising under a check for $250 produced by the plaintiff) was the same. Here it was the plaintiff who contended that a lump sum was to be paid for a loan made by the defendant Bowditch under what was in effect a second mortgage, but was technically a third mortgage on the Beacon Street land. The defendants contended that the plaintiff was to pay interest at the rate specified (twelve per cent a year) amounting to $296.68; the plaintiff that the lump sum to be paid was $250, for which sum he produced a check. His claim was to recover back the whole $296.68 which was retained out of the plaintiff's money in the hands of the defendant corporation.

The fourth item arises from the fact that the defendant Bowditch acting for the plaintiff received the purchase money

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due the plaintiff for an exchange of the Westland Avenue land for other land and $20,000. Bowditch kept $1,000 out of the $20,000, under a claim of a commission due him for his services in that matter. The plaintiff contended that nothing was due from him to Bowditch in that connection.

The fifth item is this: The mortgage loan for the Beacon Street land originally carried interest at four and one half per cent. When the loan was extended it was extended at five per cent. The agreement of extension provided that if the interest was in arrears the mortgagee might "treat this agreement as wholly null and void." The interest being in arrears after the extension, the defendant corporation, the mortgagee, gave notice of its election that the notes should become due. The plaintiff contended that this reinstated the original rate of four and one half per cent, and the defendants insisted on interest at five per cent, which the plaintiff paid. The difference between the two was $405, the amount of this, the fifth item.

The sixth and last item was for $170.80, paid by the defendant corporation for a "demolition" rider on the policies of insurance taken out for its benefit by the plaintiff. The defendants' contention was that under the clause in the mortgage the plaintiff was bound to keep the property insured against the risk covered by this rider. The plaintiff having failed to do it, the defendant corporation took out the riders and brought an action against the plaintiff for payment of the sum paid by it therefor, which the parties seem to have agreed was $170.80. The plaintiff on being sued paid the money before the writ was returnable, and the writ never was entered. The sixth item was to recover this sum of $170.80.

Apart from the two checks already referred to it is plain that the plaintiff in the case at bar did not make out a case of fraud and deceit unless a party to a contract is to be taken to have made a false and fraudulent representation of fact when he puts forward a claim based on an assertion that the contract was in fact or in law one thing and the other party to the contract controverts his claim and denies his assertion, and the jury believes the other party. But where one party to a contract makes a claim based on his assertion as to what the contract is, he does not make a representation of fact for the purpose of the other

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party to the contract acting on it nor does he make a representation of fact upon which the other party has a right to rely. That a claim is not a representation of fact was one of the grounds on which *Berkshire Ins. Co.* v. *Sturgis*, 13 Gray, 177, was decided. To hold that making a claim is making a representation of fact would be in effect to overturn the rule that a payment made voluntarily cannot be recovered back. Where a payment has been made voluntarily, it is ordinarily, if not always, made after a claim has been put forward by the party who ultimately receives the payment that the payment was due. If claiming the money to be due is a representation of fact on which the debtor paying can rely, all sums voluntarily paid but not legally due can be recovered back in an action for fraud and deceit. Granting that the claim is a representation of fact, a case of fraud and deceit is made out in case of the voluntary payment of such a sum by the plaintiff's testifying that the claim was made, that he relied upon that, and relying on it, paid. That is enough to make out the whole case, for that would warrant the jury in finding the *scienter* proved, since the defendants must have known what the fact was, and knowing the fact yet made the claim which, by the verdict, they subsequently found to be a claim without foundation.

At the close of the evidence "each of the defendants in respect of each several item of money claim in the first count, — the same being the claims numbered First to Sixth towards the close of said count, —" requested "the court to instruct the jury that there is no evidence to warrant a finding in favor of the plaintiff against such defendant either alone or with either or both the other defendants." The presiding judge took a general verdict on the first count of the declaration covering all six items. It is apparent from what has been said that this ruling should have been given, at least so far as the first, fourth, fifth and sixth items are concerned; and for this reason the general verdict cannot be sustained.

The bill of exceptions sets forth testimony which would have warranted a jury in finding that the plaintiff was an illiterate man of Russian extraction, and that he relied upon the defendants for advice and for keeping an account of the payments made in the course of the transactions between them. But there was no evidence that the plaintiff paid the defendants or any of

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them for so doing; and the action which the plaintiff has brought here is an action for fraud and deceit, and not an action against a fiduciary. In an action for fraud and deceit the only significance of this evidence is in its bearing on the fact (which the plaintiff must make out in proof) that he relied on the representations made by the defendant or defendants, as to which see *Light* v. *Jacobs*, 183 Mass. 206, and cases there cited. But since in our opinion there was no representation of fact, at least so far as the first, fourth, fifth and sixth items are concerned, that evidence is not material here.

Again, the bill of exceptions contains these statements: "In order to shorten this bill of exceptions and to reduce the amount of detailed evidence which it would otherwise be necessary to insert herein, the defendants hereby admit for the purposes hereof, that there was evidence at the trial upon which it was competent for the jury to find that if said several sums were severally obtained from the plaintiff and obtained from him by untrue representations, such representations were made with knowledge of the falsity thereof on the part of those who made them, severally, and were by such defendant or defendants made with intent to defraud. . . . For the purposes hereof the defendants also waive any objection to joinder and stipulate that if and in so far as a verdict could have been found upon the count in tort against any defendant in tort, it might have been found against all the defendants jointly." "The evidence hereinbefore recited coupled with the concessions and admissions hereinbefore made was all the evidence material to this bill of exceptions."

As we are of opinion that in case of the first, fourth, fifth and sixth items at least no representations of fact were made, these concessions are of no consequence.

Under these circumstances it is not necessary to consider whether the fact that the money which the plaintiff alleges to be due to him in case of the first and the fourth items never left the defendants' hands is not another insuperable difficulty in the way of the plaintiff's maintaining this action for those sums.

We have no doubt that so far as the plaintiff's testimony as to his giving the check for $5,000 for two of the three sums making up the gross claim in connection with the second item

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is concerned, the plaintiff made out a case of fraud and deceit. He testified that that check, "(if the signature was in fact his,) was obtained from him surreptitiously, and without his knowledge, and by a fraudulent shuffling of the various papers of the transaction, among which, upon his testimony, were a large number of insurance slips."

Whether a case of fraud and deceit was made out as to the check for $250 need not be considered.

Exceptions sustained.

EDWIN R. JUMP *vs.* ALBERT E. LEON.

Suffolk. March 14, 1906. — September 4, 1906.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Set-off. Bills and Notes. Practice, Civil, Set-off, Parties, Exceptions, Equitable defences.

In an action on a promissory note the defendant cannot set off as a defence at law under R. L. c. 174, § 1, a note of the plaintiff which he purchased after the action was brought.

The holder of a negotiable promissory note indorsed in blank, in which he has no beneficial interest, may maintain an action on the note against the maker if he has the assent of the beneficial owner to whom he is accountable for the proceeds.

Whether the placing of an overdue negotiable promissory note indorsed in blank in the hands of an attorney with directions to collect it but with no further instructions gives the attorney authority, in the absence of facts showing such a course to be necessary or advisable, to transfer the note to a third person having no interest therein in order that an action upon the note may be brought in the name of that person, here was not considered, an exception raising this point having been treated as waived because not argued.

Where an action on a promissory note is brought by one having no interest therein, to whom it has been transferred for the purpose of bringing the action for the sole benefit of the owner of the note who is not named in the writ, the defendant under R. L. c. 174, § 5, may be allowed to set off a claim against the beneficial owner of the note.

Where after the bringing of an action on a promissory note by a holder having no interest therein the plaintiff in interest dies, and the solvency of his estate is admitted by the executrix of his will to be doubtful but in the Probate Court she does not represent the estate as insolvent, if the defendant after the bringing of the action has acquired in good faith and for value certain unmatured notes of the plaintiff in interest, and thereafter while the action is pending and before the death of the plaintiff in interest the notes mature, but a year has not elapsed since the appointment of the executrix, the defendant cannot prove against the

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plaintiff as an equitable defence under R. L. c. 173, § 28, the notes he has acquired, although he could do so if the estate of the plaintiff in interest had been declared insolvent by a decree of the Probate Court; but in such a case the defendant on his motion may be granted a continuance until a year from the appointment of the executrix has expired so that he can obtain judgment on his claim and set it off.

CONTRACT on two promissory notes, one for $292.51 and the other for $279.80, made by the defendant payable to his own order and indorsed by him in blank. Writ in the Municipal Court of the City of Boston dated March 24, 1904.

The defences were a general denial, payment, and the equitable defence that the notes were owned, not by the plaintiff, but by one Bates who died while the action was pending; that the defendant held and owned notes made by Bates to an amount larger than the plaintiff's claim; that the estate of Bates was insolvent; and that the defendant was entitled to apply the notes made by Bates in satisfaction of the notes declared on.

On appeal to the Superior Court the case was tried before *Wait*, J. It appeared in evidence that Bates owned the notes in suit; that the plaintiff never had any interest in them; that his right to bring the action was based solely on the fact that Bates's attorney after the maturity of the notes without consideration handed them to the plaintiff for the purpose of transferring them to him in order that the action might be brought in his name; and that the plaintiff immediately handed them back to the attorney.

It also appeared that on November 28, 1904, the defendant purchased for a valuable consideration and still held certain notes of Bates for amounts which in the aggregate were more than the amount of the notes in suit; that Bates died on December 12, 1904; that on March 24, 1905, Mary E. Bates qualified as executrix of his will; and that it was not certain that his estate was solvent. These notes were offered in evidence by the defendant and were excluded by the judge.

At the close of the evidence the defendant asked the judge to make the following rulings:

1. Upon all the evidence the verdict must be for the defendant.

2. Upon all the evidence the title and ownership of the notes declared on was in Harry W. Bates at the time this action was

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brought and until his death, and is now in the executrix of his will.

3. The beneficial ownership of the notes declared on was in Harry W. Bates at the time this action was brought and thereafter until his death, and is now in the executrix under his will.

4. If the jury find that there was no delivery of the notes declared on by Harry W. Bates to Edwin R. Jump, the plaintiff, the verdict must be for the defendant.

5. The mere request of the owner of the notes to another person, to allow the use of his name as plaintiff in bringing a suit on such notes, is not sufficient to constitute a delivery of such notes to the party of whom such request is made.

6. If the defendant became the purchaser and owner of valid notes against Harry W. Bates before the death of Bates, and still remains the owner thereof, the verdict must be for the defendant.

The judge refused to make any of these rulings, and directed the jury to return a verdict for the plaintiff for the amount of the notes declared on, with interest. The jury returned a verdict for the plaintiff in the sum of $610.44; and at the request of the defendant the judge reported the case for determination by this court. If the exclusion of evidence, the refusals to rule and the direction of a verdict were correct, judgment was to be entered for the plaintiff upon the verdict; otherwise, a new trial was to be ordered.

F. L. Norton, for the defendant.

W. H. Thorpe, for the plaintiff, submitted a brief.

BRALEY, J. Under R. L. c. 174, § 1, if an action on the promissory notes set out in the declaration had been brought by Bates in his own name, and after his death prosecuted by his executrix, the defendant by reason of the statute could not at law have had by way of set-off the benefit of the counterclaim now pleaded as an equitable defence, although the notes held by him were purchased in the lifetime of the testator, because he did not acquire title until after the commencement of the action. *Cook* v. *Mills*, 5 Allen, 36. *Backus* v. *Spaulding*, 129 Mass. 234, 236.

By repeated decisions beginning with *Little* v. *Obrien*, 9 Mass. 423, it has been settled that the holder of negotiable paper

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indorsed in blank to which he has no legal title, or in which he has no beneficial interest may maintain after maturity a suit thereon against the maker, with the assent of the real owner to whom when recovered he is accountable for the proceeds. *Whitten* v. *Hayden*, 9 Allen, 408. *Wheeler* v. *Johnson*, 97 Mass. 39. *National Pemberton Bank* v. *Porter*, 125 Mass. 333, 335. *Spofford* v. *Norton*, 126 Mass. 533. *Parks* v. *Smith*, 155 Mass. 26, 31. *Prescott National Bank* v. *Butler*, 157 Mass. 548. *Regina Flour Mill Co.* v. *Holmes*, 156 Mass. 11. *Haskell* v. *Avery*, 181 Mass. 106. *New England Trust Co.* v. *New York Belting & Packing Co.* 166 Mass. 42, 45. *Fay* v. *Hunt*, 190 Mass. 378. See *Towne* v. *Wason*, 128 Mass. 517.

It is unnecessary, however, to decide whether the placing of the notes by Bates in the hands of an attorney at law with directions to collect them but with no further instructions, there being no disclosure of any facts on the evidence which rendered such a course on his part necessary or advisable, constituted a sufficient authorization for him to transfer them to the plaintiff for the purpose of having the action brought in his name; for the exceptions to the refusals to rule that for this reason, as neither the beneficial interest nor legal title passed, the action could not be maintained have not been argued, and must be considered as waived.

This leaves as the only question whether the defendant has a right to an equitable set-off of the unmatured notes. Beyond the mere form in which the present action is cast is the substance of the contractual relations of the parties in interest even if the demands are unconnected, and in equity, or at law, the nominal difference of parties plaintiff, where the litigation in reality is for the sole use and benefit of a party not named in the writ, but whose title is shown to be absolute, is not a bar which prevents the other party from maintaining his claim in set-off. R. L. c. 174, § 5. *Commonwealth* v. *Phœnix Bank*, 11 Met. 129, 136. *Tyler* v. *Boyce*, 135 Mass. 558, 560. *Boyden* v. *Massachusetts Ins. Co.* 153 Mass. 544, 548. *Stewart* v. *Coulter*, 12 S. & R. 252.

The notes held by the defendant, apparently as a purchaser for value and in good faith, matured on December 10, 1904, and the maker died on December 12, 1904, and a year not having

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elapsed since the appointment of the executrix an action against her cannot be maintained until its expiration. *Smith* v. *Hill*, 8 Gray, 572, 574. R. L. c. 141, § 1. No unreasonable delay in bringing an action, therefore, can be imputed, and from the evidence of the executrix it may be inferred that the estate is not solvent, and if before verdict it had been represented insolvent, the set-off claimed could have been enforced although the notes were not due at the date of the plaintiff's writ. R. L. c. 174, § 5. *Bigelow* v. *Folger*, 2 Met. 255. *Phelps* v. *Rice*, 10 Met. 128, 131. *Aldrich* v. *Campbell*, 4 Gray, 284, 286. The position then in which the defendant is placed is this: he holds valid outstanding promissory notes against an estate the solvency of which is admitted by the executrix to be doubtful, and is unable to enforce them independently, by reason of the special statute of limitations. The equity arising from such a situation is urged by him as a reason why he should be given the opportunity to try the question of the insolvency in fact of the estate, and upon this issue being found in his favor then to set off one debt against the other. In other jurisdictions this equitable right has been held to be created by the fact of insolvency of one of the parties where there are mutual debts similar as to their maturity to those shown in this case, and the relief given is not made dependent on a formal adjudication of the debtor as an insolvent, or a bankrupt. See *Ford* v. *Thornton*, 3 Leigh, 695, 698; *Lindsay* v. *Jackson*, 2 Paige, 581; *American Bank* v. *Wall*, 56 Maine, 167; *Gay* v. *Gay*, 10 Paige, 369, 376; *Levy* v. *Steinbach*, 43 Md. 212; *Twigg* v. *Hopkins*, 85 Md. 301; *Goodwin* v. *Keney*, 49 Conn. 563, 569; *Stewart* v. *Coulter*, 12 S. & R. 252; *Smith* v. *Felton*, 43 N. Y. 419, 423; *Nashville Trust Co.* v. *Fourth National Bank*, 91 Tenn. 336; *Ex parte Stephens*, 11 Ves. 24; *Williams* v. *Davies*, 2 Sim. 461; *Agra Bank* v. *Hoffman*, 34 L. J. (N. S.) Ch. 285; *Schuler* v. *Israel*, 120 U. S. 506; *Carr* v. *Hamilton*, 129 U. S. 252, 255; *Scott* v. *Armstrong*, 146 U. S. 499; *North Chicago Rolling Mill Co.* v. *St. Louis Ore & Steel Co.* 152 U. S. 596; *Camden National Bank* v. *Green*, 18 Stew. 546, and note; *In re Hatch*, 155 N. Y. 401.

But in *Spaulding* v. *Backus*, 122 Mass. 553, 556, where the doctrine of equitable set-off was fully considered, with a review of some of the earlier authorities, it was said "that a party,

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whose debt is not due, has no equitable claim to have it set off against a debt of his own, already due, in the hands of a party who is insolvent," and hence in those of his executor or administrator, where neither the debtor nor the estate has been adjudicated insolvent, and this doctrine was approved and followed in *Wiley* v. *Bunker Hill National Bank*, 183 Mass. 495, 497, 498. The rule established by these cases so far as they relate to this question is that if a decree had been passed by the Probate Court declaring the estate of Bates insolvent this defence would have been immediately available, but as the executrix has not chosen to take such action the fact of actual insolvency cannot be shown under R. L. c. 173, § 28, permitting an equitable defence which entitles a defendant to be unconditionally relieved against either the claim, or the judgment, by any form of appropriate relief recognized by a court of equity. *Barton* v. *Radclyffe*, 149 Mass. 275, 280. *New York, New Haven, & Hartford Railroad* v. *Martin*, 158 Mass. 313. *Nash* v. *D'Arcy*, 183 Mass. 30.

But it would be unfortunate if the defendant was finally left without any remedy which a court in the exercise of a sound discretion might grant. If the plaintiff obtained judgment, and then instead of taking out execution brought suit, the exemption of the executrix having expired, and the defendant's notes having matured, they could be set off under R. L. c. 174, § 5. It is suggested that as this section applies only to debts which may be put in suit, if the defendant recovered judgment against the estate, by reason of the diversity of parties such judgments would not be a subject of set-off. The court will look at substance instead of form for the purpose of administering justice, and in *Barrett* v. *Barrett*, 8 Pick. 342, it was decided that judgment in favor of the judge of probate in a suit on a probate bond could be set off against a judgment recovered by the executor in his individual capacity against the legatee for whose benefit the first suit had been instituted. Nor is it requisite that the name of the real party in interest should appear in the record, as this may be shown by oral evidence, and when established a set-off follows with the same effect as if the adverse party had been disclosed by the recitals in the judgment. *Sheldon* v. *Kendall*, 7 Cush. 217, 219. See *Fiske* v. *Steele*, 152 Mass. 260; *Tilton* v. *Goodwin*, 183 Mass. 236. To afford this relief courts, pro-

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ceeding according to the common law with jurisdiction of the subject matter and of the parties, have continued cases after verdict until a defendant could obtain judgment on his claim which for any sufficient reason could not have been pleaded in the action, so that ultimately such set-off could be made. *Dennie* v. *Elliott*, 2 H. Bl. 587. *Barker* v. *Braham*, 2 Wm. Bl. 869. *Brown* v. *Hendrickson*, 10 Vroom, 239. *Wolcott* v. *Jones*, 4 Allen, 367, 368. *Ames* v. *Bates*, 119 Mass. 397. *Chipman* v. *Fowle*, 130 Mass. 352, 354. See *McLauthlin* v. *Smith*, 176 Mass. 46, 47.

It will be open to the defendant by a motion in the Superior Court for a continuance for judgment to obtain suitable relief, but if such action is not taken, or relief is not granted, then according to the terms of the report, as no error of law is found at the trial, the order must be

Judgment for the plaintiff on the verdict.

LUCY S. NAY *vs.* BOSTON AND WORCESTER STREET RAILWAY COMPANY.

GEORGE M. NAY *vs.* SAME.

Suffolk. March 16, 1906. — September 4, 1906.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Arbitrament and Award. Election.

Where in a pending action of tort for personal injuries the parties file in court an agreement of submission to arbitration to determine the amount of the damages, which in the main is in the terms of a statutory submission under R. L. c. 194 but is void as a submission under that statute from a failure to comply with its terms, and the agreement is "allowed" by the court, if one of the parties to the action, in opposing a motion to dismiss the reference to arbitration and reject an award made under it, asks for rulings that the reference and the award are valid under the statute and are in compliance with its terms, that party is bound by these requests and afterwards cannot take the ground that the reference although void under the statute is good as a reference for the assessment of damages under an order of court.

An attempted submission to arbitration under R. L. c. 194, which provides that the arbitrators shall hear the parties only in case they consider hearings necessary, is void for want of compliance with the statute.

An attempted submission to arbitration under R. L. c. 194, which provides that

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if two physicians named as arbitrators are unable to agree as to the damages caused by certain personal injuries they shall call in as a third arbitrator some reputable physician on whom they agree and that the award of a majority of the three arbitrators shall be final, is void for want of compliance with the statute.

Where two several causes of action of a wife and her husband against the same corporation and arising from the same injuries are submitted to arbitration by an agreement under R. L. c. 194, an award of a round sum to the wife and her husband jointly is void.

TWO ACTIONS OF TORT, one by a married woman for personal injuries and the other by her husband for expenses and the loss of her services and society caused by the injuries. Writs dated November 30, 1904.

The following agreement of the parties was filed in the Superior Court on June 19, 1905:

"Be it known that Lucy S. Nay, wife of George M. Nay, of Boston, in the County of Suffolk, and George M. Nay, of said Boston, as her husband, of the first part, and the Boston & Worcester Street Railway Company, a corporation duly organized under the laws of the Commonwealth of Massachusetts, of the second part, hereby agree to submit the demands, a statement of which is contained in two declarations filed in said Superior Court for Suffolk County, copies of which are sent herewith, and all other demands between them, to the arbitration of Dr. Edward Reynolds of 65 Marlborough Street, Boston, and Dr. James R. Chadwick of 230 Clarendon Street, Boston, the award of whom being made and reported within six months from this date, the judgment thereon shall be final, but without costs of court, against the said Boston & Worcester Street Railway Company, and on application of party of the first part execution may issue thereon. If the said Dr. Edward Reynolds and the said Dr. James R. Chadwick are unable to agree, they shall call in as a third arbitrator some reputable physician on whom they may agree, and the award of a majority of the three arbitrators may then be reported and shall be final. If either of the parties hereto neglects to appear before the arbitrators, after due notice given to them of the time and place appointed for hearing said parties, if said arbitrators consider hearings necessary, said arbitrators may proceed in the absence of the parties so neglecting to appear before them.

"The liability of the Boston & Worcester Street Railway

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Company is admitted and the question of damages, if any, to be decided by the arbitrators hereunder, is based upon the following propositions:

"First: Taking into consideration the previous medical history and age of Lucy S. Nay, what injury, if any, did she suffer as a result of the accident at Chestnut Hill on October 22, 1904. Counsel agree that as a matter of law, if injured, she is entitled to recover fair and reasonable compensation based on her suffering and the duration thereof, her incapacity as to her ordinary occupation resulting from said accident according to the length thereof, her permanent injury, if any, her loss of earnings if any. All the foregoing in so far only as the same are the result of said accident.

"Second: All reasonable expenses in excess of usual and ordinary expenses made necessary by the accident of October 22, 1904. The written statement of George M. Nay, her husband, annexed, may be considered.

"If any questions arise as to the law of damages, regarding which the arbitrators desire legal advice, they may submit these questions in writing to both counsel, who will return an answer to the same in writing.

"Dated this 16th day of June, 1905.

"Lucy S. Nay, and George M. Nay, as her husband, by Frank N. Nay, Attorney, Party of the First Part.

"Boston & Worcester Street Railway Company, by Guy Murchie, Attorney, Party of the Second Part."

"Commonwealth of Massachusetts. Suffolk, ss. Boston, June 16, 1905.

"Then personally appeared the above named Frank N. Nay, attorney for the party of the first part, and Guy Murchie, attorney for the party of the second part, and severally acknowledged the above instrument by them signed to be the free act and deed of the several parties represented by them, before me,

"Alton W. Eldredge, Notary Public."

On June 30, 1905, the following award by the persons named as arbitrators was filed in court:

"Whereas, an agreement for arbitration made and executed between the above parties has been referred to us, and we have

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examined said Lucy S. Nay, and have considered her claim and the claim of her husband, and have agreed without the need of calling in a third physician;

"Now therefore, we as arbitrators find that the Boston & Worcester Street Railway Company should pay said Lucy S. Nay and said George M. Nay jointly the sum of Fifteen Hundred Dollars ($1500) and an award of that amount is hereby made this 26th day of June, 1905, in accordance with the terms of said agreement for arbitration, to be reported to the Superior Court for the County of Suffolk, in accordance with the terms of said agreement for arbitration.

"James R. Chadwick, M. D., Edward Reynolds, Arbitrators."

After the award the plaintiffs filed a motion to dismiss the reference to the physicians of the question of damage on which they had made an award, and attached to the motion an affidavit of the plaintiff Lucy S. Nay. Subsequently affidavits of Dr. Edward Reynolds, Dr. James R. Chadwick and Frank N. Nay, counsel for the plaintiffs, were filed.

The motion was heard by *Lawton*, J. upon the affidavits filed in court.

The defendant requested certain rulings, of which some were given and the others refused. The judge was asked, generally, to find and rule upon all the competent evidence presented that the motion of the plaintiffs should be denied, that the agreement of arbitration was valid and should not be dismissed, and that the award of the physicians was a valid and binding award. The judge refused so to rule, but allowed the motion of the plaintiffs, and made an order rejecting the award and dismissing the order of reference. The defendant appealed, and also alleged exceptions.

The first, second and thirty-first rulings requested by the defendant which are mentioned in the opinion were as follows:

"1. The reference to arbitration in these cases is valid and in compliance with the terms of chapter 194 of the Revised Laws of Massachusetts.

"2. The award of the arbitrators is in form and substance in compliance with the terms of chapter 194 of the Revised Laws of Massachusetts."

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"31. I rule that inasmuch as no hearings as contemplated by the statute, Revised Laws, chapter 194, were held, and the defendant had no notice of any examination of Mrs. Nay and was not present and had no part in the proceeding, and the proceeding was devoid of any formality or attempt at formality, that the rule that 'all the arbitrators shall meet and hear the parties' does not apply."

The judge gave the rulings numbered 1 and 2 and refused to give the ruling numbered 31.

G. Murchie & J. F. Bacon, for the defendant.

E. N. Carpenter, for the plaintiffs.

LORING, J. The parties to these two actions at law might have submitted to arbitration the matters in dispute between them by a submission *in pais*, a submission under the statute, or by a rule of court made in each action. If the first method of procedure had been adopted, the only way of enforcing the award would have been by an action on the award when made. If the second had been adopted, it would have been an independent proceeding in court. The third method of procedure is the only method which *proprio vigore* would have ended the further prosecution of these two actions.

Had it not been for the first, second and thirty-first rulings asked for by the defendant, it might have been somewhat difficult to decide which method of submission to arbitration the parties in these actions intended to take. On the one hand the submission in the main is in the terms of a statutory submission under R. L. c. 194. On the other hand it was filed in the two actions and "allowed" by the court.

But the defendant is bound by its first, second and thirty-first requests for rulings, in which it in effect asked that the submission should be treated as a submission under the statute. As a statutory submission it is void. It departs from the form prescribed in R. L. c. 194, in providing in substance (first) that no hearings are to be had except in the discretion of the arbitrators, and (second) for the selection of "some reputable physician" as a referee if the two arbitrators named are unable to agree. These are matters of substance, and render the submission void as a submission under the statute. As to the second objection stated above see *Monosiet* v. *Post*, 4 Mass. 532; *Frank-*

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lin Mining Co. v. *Pratt*, 101 Mass. 359. As to the general principle see *Abbott* v. *Dexter*, 6 Cush. 108; *Bent* v. *Erie Telegraph & Telephone Co.* 144 Mass. 165. This rule was not overthrown by the recent decision in *Giles* v. *Royal Ins. Co.* 179 Mass. 261.

Since the defendant elected to treat the submission to arbitration as a submission under R. L. c. 194, and as a submission under that statute it is void, there was no error in proceeding with the trial of these two actions in the court below.

It is perhaps worth while to state in addition that the present award in any event was bad because it was a joint award on the submission of two several causes of action. See *Giles* v. *Royal Ins. Co.* 179 Mass. 261.

The appeal is not properly before us, no final judgment having been entered.

Appeal dismissed; exceptions overruled.

GILES TAINTOR *vs.* MAYOR AND CITY COUNCIL OF CAMBRIDGE.

Middlesex. April 30, 1906. — September 4, 1906.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Way, Laying out of highway. *Municipal Corporations.*

In laying out a street the members of a city council act as public officers representing a continuous body, and such a laying out begun by and partly heard before one city council, after a further hearing before another city council, finally may be completed by a third city council before which there has been no hearing.

Under the provision of § 94 of R. L. c. 48, relating to highways and town ways, that "the provisions of the preceding sections, so far as applicable, shall apply to cities, except as may be otherwise provided by their charters or by special laws," the provision of § 4 of the same chapter that the county commissioners in laying out a highway shall, if requested, view the premises, does not apply to the laying out of a highway by a city council, and in that case a view taken by the joint committee on highways of the city council is sufficient.

Where a city council has referred the matter of the laying out of a street to its joint committee on highways, and that committee, after taking a view and giving a hearing to all persons interested, by a report to the city council recommend the laying out of the street and the adoption of an order accompanying

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the report which recites that public convenience and necessity require that the street should be laid out, and the city council, after a hearing of which all persons interested have had notice, refers this order to the board of survey, a body created by statute for the purpose of passing upon the laying out and construction of highways in the city, this constitutes an adjudication by the city council that the public convenience and necessity require the laying out of the street.

MORTON, J. This is a petition for a writ of certiorari to quash the proceedings of the respondents as mayor and city council of the city of Cambridge in accepting and laying out a certain street in Cambridge called Brown Street. The petitioner is an abutting owner whose land was taken in the laying out of the street. The presiding justice found that the allegations of fact contained in the answer of the respondents were true, and thereupon ruled that no error of law appeared. He further found that substantial justice did not require the writ to be issued and dismissed the petition, and, at the request of the petitioner, reported the case to the full court, such order to be entered as law and justice may require.

We think that the ruling was right. One question, if not the principal one, is whether proceedings in relation to the laying out of a street begun before one council and board of aldermen may be continued before succeeding councils and boards of aldermen and finally completed by a council and board of aldermen composed of different members from that before which they were instituted and by which parties have been heard. A city council is a continuous body though its members and its officers may change from time to time. See *Collins* v. *Holyoke*, 146 Mass. 298; *Fairbanks* v. *Fitchburg*, 132 Mass. 42. In recognition of this the city charter of Cambridge provides that "every officer of the city shall, unless sooner removed, continue after the expiration of his term of service to hold his office until his successor is appointed or elected and duly qualified." St. 1891, c. 364, § 33. In the transaction of business that may come before them the members of one city council properly may refer unfinished matters to those who are to succeed them, and succeeding members may adopt or acquiesce in the official action of their predecessors upon such matters. They are not obliged in every case to begin *de novo*. In the laying out of a street the members of a city council act as public officers in the discharge of duties appertaining to the office which they hold and to the

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municipality which the council represents. And it follows from the continuous nature of the body, and the purely official relation which those who compose it sustain to it, that the laying out of a street begun and partly heard or finished before one council and board of aldermen may be completed before another council and board of aldermen. So far, therefore, as the petitioner relies upon the contention that a part of the proceedings took place and hearings were had before some other council and board of aldermen than those of 1905 which finally completed the laying out of the street and the taking of land therefor, his contentions must fail.

The petitioner further contends that the city council should have taken a view, that there was no adjudication by it of public convenience and necessity, and that there was no hearing by the city council on the final laying out of the street and taking of the petitioner's land.

The proceedings were begun in June, 1902, and completed in December, 1905, and it is apparent, we think, from an examination of the copies of the records of the board of aldermen, of the common council and of the board of survey which are annexed to and form a part of the answers of the defendants and which in their allegations of fact must be taken as true under the finding of the single justice, that the petitioner had full notice and an opportunity to be heard in regard to all matters connected with the laying out of the street and the taking of his land where a hearing was required, or he was entitled to one. The petitioner contends that the law in regard to the laying out of highways by county commissioners applies to the laying out of streets in cities. But it applies only "so far as applicable," and "except as may be otherwise provided by their charters or by special laws." R. L. c. 48, § 94. It is manifest that provisions in regard to a view applicable to a small body consisting of three, like the county commissioners, would be inapplicable to a numerous body like a city council, and there is nothing in the city charter of Cambridge which requires that a view should be taken by the city council or which prevents it from being taken, as it was in this case, by the joint committee on highways to which the petition for the laying out of the street was referred by the board of aldermen; — the charter requiring that action should

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be first taken by that board. There is nothing which requires that another view should be had at the request of a party interested, if one has already been taken.

The committee on highways having taken a view gave a hearing on the question of laying out the street of which the petitioner had due notice, but at which he was not present. The committee reported to the city council recommending the laying out of the street and the adoption of an order accompanying the report providing for notice and a hearing in regard to the intention of the city council to lay out the street. The order began by reciting that public convenience and necessity required that the street should be laid out. At a joint convention of the city council held in November, 1902, after a hearing, of which the petitioner and all others interested had notice and at which the petitioner was present, the order was referred to the board of survey, a body which had been established under St. 1900, c. 405, amended by St. 1903, c. 436. This constituted an adjudication by the city council that public convenience and necessity required the laying out of the street.

The board of survey took a view, and gave hearings of which the petitioner and others interested had notice, and at one of which, at least, the petitioner was present. The board voted to change the proposed layout and so reported to the city council. Thereupon the matter was referred again by the city council to the joint committee on highways which took another view and gave a hearing on the laying out of the street as altered by the board of survey of which the petitioner and others had due notice, and reported recommending the adoption of an order which recited that public convenience and necessity required that the street should be laid out, and provided for the giving of notice to all parties interested of a hearing in regard to the intention of the city council to lay it out and take the land therefor. This was referred to the next city government by which it was again referred to the joint committee on highways which reported, recommending the adoption of an order substantially like that last above referred to, which was done and a hearing was had in joint convention at which the petitioner appeared. The result of the matter was that the question of laying out the street was again referred to the next city government, that of 1905, by which

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on the recommendation of the joint committee on highways, to which the matter had been referred, and which took still another view and gave still another hearing, the order laying out the street was finally adopted. It is plain, we think, that the petitioner was not entitled to be heard upon the final adoption by the city council of the order laying out the street, and we see no error of law in the proceedings, or in the finding that substantial justice did not require the issuing of the writ.

Petition dismissed with costs.

G. A. A. Pevey, for the respondents.

G. Taintor, pro se.

E. ADELAIDE BASS *vs.* INHABITANTS OF WELLESLEY. SAME *vs.* SAME.

Norfolk. January 11, 1906. — September 5, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, & SHELDON, JJ.

Evidence, Presumptions and burden of proof. *Bills and Notes. Payment. Mistake. Municipal Corporations.*

In an action against a town on promissory notes purporting to be signed in approval by the selectmen of the defendant, which were negotiated fraudulently by a defaulting treasurer of the town who then was in good standing and which came into the hands of the plaintiff as a *bona fide* purchaser, where the defence is that the signatures of the selectmen were forged by the treasurer, the burden is on the plaintiff to show by a fair preponderance of the evidence, with all reasonable inferences to be drawn from it, that the notes sued upon are genuine, but he is not bound to exclude the possibility that they were forged.

In an action against a town on two promissory notes purporting to be signed in approval by the selectmen of the defendant, which were negotiated fraudulently by a defaulting treasurer of the town who then was in good standing and which came into the hands of the plaintiff as a *bona fide* purchaser, where the defence was that the signatures of the selectmen were forged by the treasurer, it appeared that meetings of the selectmen were held regularly on a certain evening of every week and that notes usually were signed at such meetings, that notes usually were signed two or three days before their dates, that the notes sued upon bore date four days after a meeting at which two notes for the same amounts as the notes sued upon had been signed by the selectmen, that the notes sued upon were sold by the treasurer on the day before the next meeting of the selectmen, that these notes did not appear in the list of genuine notes of the town nor in the treasurer's accounts and were not to be found, the plaintiff having parted with them in exchange for a renewal note forged by the treasurer. There was nothing to show that at the meeting last preceding the date of

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the notes the selectmen signed more than two notes or that more than two notes were signed by them between that meeting and the next one. *Held*, that there was evidence warranting a finding that the two notes signed by the selectmen at the meeting four days before the date of the notes sued upon were the two notes purchased by the plaintiff.

The surrender of a genuine note of a town in exchange for an instrument purporting to be a renewal note forged by the treasurer of the town does not extinguish the surrendered note, which, although not to be found, still can be sued upon by the holder thus induced to give it up.

If the holder of a genuine note of a town surrenders it in exchange for an instrument purporting to be a renewal note which has been forged by the treasurer of the town by raising it from $5,000 to $15,000, and the holder is acting under a mistake in supposing that the treasurer has authority to renew the note as well as in believing the renewal note to be genuine, his mistake of law as to the authority of the treasurer does not prevent him, when suing later on the surrendered note, from showing that the instrument accepted in renewal was a forgery and therefore that the note surrendered by him was not extinguished.

MORTON, J. These two actions were tried and argued together. The only evidence offered was the auditor's report which it was agreed should be accepted in both cases as a finding upon the facts. It also was agreed that the only questions of law to be determined were the questions arising upon the auditor's report and the pleadings. The judge found for the plaintiff in the first action, and for the defendant in the second, and reported the cases upon the question whether the evidence contained in the auditor's report was sufficient in law to warrant his findings.

The first action is upon three notes alleged to have been authorized by a vote of the town, signed in the name of the town by one Jennings, its treasurer, and approved by its three selectmen, two of the notes being alleged to have been lost and the other alleged to be in the possession of the defendant. If the plaintiff prevails in the first action she does not seek to recover in the second.

We are of opinion that there was evidence sufficient to warrant a finding for the plaintiff in the first action. That case turns upon the question whether there was sufficient evidence to warrant a finding that the two notes,* which, it is found, were

* The first of the notes sued upon was as follows:

"State of Massachusetts.

"$5,000.00 Wellesley, December 23, 1899.

"One year after date, for value received, the Town of Wellesley, by its Treasurer, acting under authority of a vote of the Town, passed March 6,

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signed by the selectmen at the meeting of December 19, were the two notes that subsequently were sold by Jennings to Estabrook and Company, and by them were sold to the plaintiff. There are other questions but this seems to us to be the principal one. It is conceded that the third note was a genuine note, and the defence to that rests on other grounds than forgery. The two notes referred to bear date December 23, 1899. They did not appear upon the books kept by Jennings as town treasurer, there was no entry on those books charging him with the proceeds, and they were not mentioned in his report to the town. They were surrendered to Jennings under circumstances hereinafter stated. At the time when they were issued he was a defaulter to the extent of $25,000. On December 27 he sold to R. L. Day and Company two notes also of $5,000 each and bearing date December 27. These notes appear in his accounts and are admittedly genuine. The two notes bearing date December 23 were sold by him to Estabrook and Company on December 26 for $9,552.50, being the face of the notes less the discount. Estabrook and Company paid for the notes by a check payable to the order of the town of Wellesley which was indorsed by Jennings as treasurer, and on the same day de-

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1899, promises to pay to the order of its Treasurer the sum of Five Thousand Dollars, in Boston, at the Boston Safe Deposit and Trust Company. This note is given in anticipation of taxes of the present municipal year, and is payable therefrom.

"The Town of Wellesley,
"By Albert Jennings, its Treasurer.

"Approved, and we certify that this note is issued under authority of the above described vote, that it conforms to the requirements thereof, and that the total sum borrowed to date, including this note, is $50,000.

"Fred O. Johnson,
[SEAL] Richard Cunningham,
Oliver C. Livermore,
[Indorsed] Selectmen of the Town of Wellesley."
"The Town of Wellesley,
"By Albert Jennings, its Treasurer."

Here followed a certificate of the town clerk to a copy of a vote of the town authorizing the treasurer with the approval of the selectmen to borrow temporarily in anticipation of taxes the sum of $80,000.

The second note was exactly similar to the first in all respects except that in the certificate of the selectmen the total sum borrowed to date was stated to be $55,000 instead of $50,000.

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posited by him to the credit of the town in the Boston Safe Deposit and Trust Company. It does not appear whether the notes which the selectmen signed on December 19 were then dated, or, if they were, what the date was, and the defendant contends that the circumstances are, to say the least, as consistent with the contention that they were the notes which were dated December 27 and sold to R. L. Day and Company on that day, as with the contention that they were the notes dated December 23 and sold to Estabrook and Company. If the former was the case then it would seem to follow that the two notes dated December 23 and sold to the plaintiff were forgeries.

The selectmen kept no complete record of the notes which they signed or of the total amount which the town had borrowed. Meetings were held regularly every Tuesday evening and notes were usually signed at such meetings; but they also frequently were signed by them at their houses or places of business. Notes were usually signed two or three days before their date. The selectmen had a regular meeting on Tuesday evening December 19 and one also on Tuesday evening December 26. It is found, as already observed, that two notes for $5,000 each were signed by the selectmen at the meeting which was held Tuesday evening December 19, and it would plainly be more in accord with the usual course of business that these notes should have been dated December 23, than that they should have been dated December 27, which would carry them by another meeting of the selectmen. In view of the fact that there would be a regular meeting on the evening of December 26 it can hardly be supposed that the notes signed on the 19th would be dated as of the 27th. And if the date was written in at the time when the notes were signed by the selectmen on the 19th the probabilities are more in favor of its being the 23d than the 27th. Or if, as quite likely, no date was written in, it is more probable that Jennings procured the selectmen to sign them with the expectation on their part and his that they would be negotiated before the next meeting and that pursuant to such expectation he dated them December 23 but delayed or was prevented from disposing of them till the 26th, than that he dated and disposed of them on the 27th. Moreover Jennings was a defaulter, and it is not unreasonable to suppose that he

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would seek to cover up his defalcation by procuring the selectmen to sign notes, which, according to the usual course of business, he could easily do, and disposing of the notes thus signed and depositing the proceeds to the credit of the town omitting all reference to them in his accounts. The fact that the notes are not to be found and that they do not appear in the list of genuine notes nor in his accounts is not necessarily inconsistent with their genuineness. To have entered them of record would have made his detection more certain if and when his accounts were examined. There is nothing to show that the selectmen signed more than two notes on the 19th, or that more than two notes were signed by them between that and the 27th, and it would seem highly improbable, that, with two genuine notes of $5,000 each in his possession undisposed of, Jennings would forge two others of the same amounts and date them the 23d. The plaintiff is not bound to exclude the possibility that the two notes which the selectmen signed on the 19th were those that were dated and sold on the 27th but only to show by a fair preponderance of the evidence, with all reasonable inferences therefrom, that they were the notes declared on. *Woodall* v. *Boston Elevated Railway*, *ante*, 308. And we are of opinion that she has done so; or, at least, that it cannot be said that there was not evidence warranting such finding.

The three notes which are the subject of the first action fell due in December, 1900. They were not paid in cash at maturity, but were surrendered to Jennings for what purported to be a note of the town for $15,000. This note is found by the auditor to have been raised from five to fifteen thousand dollars. When this note fell due it was also surrendered to Jennings who gave what purported to be a new note by the town for the same amount. The auditor found that both of these notes were forgeries; but, even if they were not, he ruled that the treasurer would have had no right under the votes of the town to issue them in renewal of other notes. *Abbott* v. *North Andover*, 145 Mass. 484. It is clear that payment by a forged note is no payment. *Central National Bank* v. *Copp*, 184 Mass. 328. *National Granite Bank* v. *Tyndale*, 176 Mass. 547. *Walker* v. *Mayo*, 143 Mass. 42. *Grimes* v. *Kimball*, 3 Allen, 518. *Atkinson* v. *Minot*, 75 Maine, 189. The defendant contends that the

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plaintiff must be held, as matter of law, to have taken the renewal notes with knowledge of the treasurer's want of authority to issue them, and that therefore her surrender of the old notes and acceptance of the new operated to extinguish the former. That would give to a presumption of law greater effect than would be given to the actual fact. If the plaintiff had had actual knowledge of the treasurer's want of authority, she would not have surrendered the old notes at all, except upon payment or the receipt of others equally good. The most that can be fairly said is that she was mistaken as matter of law in thinking or assuming that the treasurer could give notes in renewal, and that that fact operated with his implied representation that the renewed notes were valid, to induce her to surrender the old notes and accept the renewed notes in place thereof. A surrender of the old notes under such circumstances would not operate to extinguish them, or to prevent the plaintiff from showing that the notes accepted in renewal were forgeries.

The result is that in each case the judgment is to be affirmed.

So ordered.

R. M. Morse, (*L. Bass, Jr.* with him,) for the plaintiff.

A. E. Pillsbury & E. K. Arnold, for the defendant.

FARMERS NATIONAL BANK OF ANNAPOLIS *vs.* CLARENCE H. VENNER & others.

CLARENCE H. VENNER *vs.* FARMERS NATIONAL BANK OF ANNAPOLIS.

Suffolk. March 5, 1906. — September 5, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Bills and Notes. Maryland. Conflict of Laws. Evidence, Proof of foreign law. *Pledge. Conversion.*

In this Commonwealth the rule, that the holder of a promissory note which is payable at a particular time and place can maintain an action on the note against the maker without showing a demand or presentment at the place named, applies also to a note which is payable at a particular place on demand, and the presentation of such a note and a personal demand on the maker in a State other than that in which the place named for payment is situated are sufficient, if any demand is necessary before suing on the note.

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In an action on a promissory note payable on demand against the maker, it appeared that the note was dated and apparently was made in the city and State of New York, that it was given in renewal of a note held by a firm doing business at Baltimore in the State of Maryland, was delivered to the plaintiff, a bank organized under the laws of the United States and doing business at Annapolis in the State of Maryland, at its usual place of business in Annapolis, and was made payable at the office of the firm doing business in Baltimore. There was evidence that the note was presented personally to the defendant and that a demand was made upon him for its payment in the city of New York. There was no evidence of a presentation or demand at the office of the firm in Baltimore which was named as the place of payment. There was evidence that by the law of the State of Maryland a demand at the office of the firm in Baltimore was not necessary to enable the plaintiff to maintain its action. No evidence was introduced as to the law of the State of New York. *Held*, that the contract was governed by the law of Maryland or the law of New York; that in the absence of evidence as to the law of New York it was presumed to be the same as the common law of this Commonwealth; and that in either case no demand at the place named for payment was necessary.

Where bonds are pledged as collateral security for the payment of a promissory note which provides that the holder on non-performance by the maker of his promise may sell the collateral or any part of it "in such manner as the holder hereof may deem proper, without notice, at any stock exchange, or at public or private sale, at the option of the holder hereof, and with the right on the part of the holder hereof to become purchaser thereof at such sale," and where upon default in payment of the note the holder, after actual and ample notice to the maker of the time and place of the sale, sells the bonds held as collateral by a proper auctioneer at a proper place at one of the auctioneer's regular auction sales, and bids in the bonds at a price very much less than other bonds of the same issue were sold for before and after the sale, and the person who bids in the bonds for the holder is the only bidder, these facts show no ground for setting aside the sale and do not constitute a conversion of the bonds by the holder of the note in thus purchasing them.

A sale of bonds pledged as collateral security for the payment of a promissory note under a power of sale in the note is not invalidated by the fact that the bonds were advertised as six per cent bonds whereas the rate of interest had been reduced to five per cent, if the reduction in the rate of interest had taken place before the bonds were pledged and the pledgor never had caused them to be stamped as five per cent bonds, although he had called the attention of the pledgee to the reduction in interest and had suggested to the pledgee that it should have the bonds properly stamped as five per cent bonds, and if there is nothing to show that the sale was affected adversely by advertising the bonds as six per cent bonds, and it appears that six per cent bonds of the same issue were sold at auction by the same auctioneer before and after the sale in question for the same price as the five per cent bonds, and that both the pledgee and the auctioneer were justified in believing that it would make no difference whether the bonds were advertised and sold as six per cent bonds or as five per cent bonds.

MORTON, J. These two actions were tried together before a judge of the Superior Court sitting without a jury.

The first is an action of contract by the plaintiff bank as the

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holder of a certain promissory note, against the defendants as makers, to recover the balance alleged to be due after the sale and application of the collateral. The note is dated "New York City, May 14, 1892," and is payable on demand after date to the order of the makers at the office of Wilson, Colston and Company, Baltimore, and is indorsed by the defendants. The writ is dated May 13, 1898, the last day before the action would have been barred by the statute of limitations. The plaintiff is a banking association organized under the laws of the United States and having its usual place of business at Annapolis in the State of Maryland. The defendants formerly were co-partners doing business in New York City under the name of C. H. Venner and Company. Personal service was made in this State on the defendant Venner, but no service was made on either of the other two defendants. The firm of C. H. Venner and Company was dissolved July 31, 1892, and the assets became the sole property of the defendant Venner.

The second action is tort for the alleged conversion of $26,000, par value, of the bonds of the American Water Company of Omaha, Nebraska, pledged as collateral to secure the payment of the above note. The note provided, amongst other things, that the holder might sell the collateral or any part thereof on non-performance of his promise by the maker "in such manner as the holder hereof may deem proper, without notice, at any stock exchange, or at public or private sale, at the option of the holder hereof, and with the right on the part of the holder hereof to become purchaser thereof at such sale." It also contained a provision that "in case of depreciation in the market value of the security hereby pledged, . . . a payment is to be made on account, or additional approved security given, upon demand, so that the market value of the security shall always be at least ten per cent (10%) more than the amount unpaid of this note. In case of failure to do so, this note shall be deemed to be due and payable forthwith, . . . and the holder hereof may immediately reimburse himself by sale of the security in the manner provided for above." The note is signed "C. H. Venner & Co." and the words "Due on demand" immediately precede the signature. There was evidence tending to show, or from which it could have been found, that the note and bonds were

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presented to the defendant Venner in person at his office in New York City and a demand for payment was made. There also was evidence that a demand was made upon him for the payment of $5,000 on account, and for additional collateral under circumstances which justified the latter according to the terms of the note. Neither of the demands thus made was complied with. There was no evidence of a presentment or demand at the office of Wilson, Colston and Company in Baltimore, or that there were funds there to meet the note if it had been presented. The collateral was sold through the firm of A. H. Muller and Son in New York City and was bid in for the bank at a price, except as to one bond, very much less, as there was testimony tending to show, than other bonds of the same issue were sold for before and after the sale in question. This constitutes the conversion complained of. It is conceded, or, at least, is stated in the bill of exceptions as a fact, that A. H. Muller and Son were proper auctioneers, and that the place where the bonds were sold was a proper place to sell them.

The judge found for the plaintiff in the first action in the sum of $24,865.26, and for the defendant in the second action. The cases are here on exceptions by the defendant Venner to the refusal of the judge to give certain rulings requested by him and to the finding that was made.

We see no error in the rulings or refusals to rule, or in the finding that was made.

The defendant Venner contends in the first place that no action can be maintained on the note because no demand was made for its payment at the office of Wilson, Colston and Company in Baltimore. It is settled in this State, both at common law and recently by statute, and by the weight of authority in this country, contrary to the law in England, that, where a note or bill of exchange is payable at a particular time and place, no demand or presentment at the place named is necessary in order to entitle the holder to maintain an action upon the note or bill against the maker or acceptor. *Ruggles* v. *Patten*, 8 Mass. 480. *Carley* v. *Vance*, 17 Mass. 389. *Payson* v. *Whitcomb*, 15 Pick. 212. *Wright* v. *Vermont Ins. Co.* 164 Mass. 302. R. L. c. 73, § 87. For a collection of cases see Dan. Neg. Instr. (3d ed.) § 643; 1 Pars. Notes & Bills, (1st ed.) 305 *et seq.*;

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4 Am. & Eng. Encyc. of Law (2d ed.) 873. We see no valid distinction between a note payable on time at a particular place and a note payable on demand at a particular place. No demand is necessary before suit, where a note is payable generally on demand, and as we have seen no demand is necessary when a note is payable on time at a particular place. It seems to us that the fact that both circumstances are found in the same note cannot operate to change the rule and render a demand necessary when it would not otherwise be required. *McKenney* v. *Whipple*, 21 Maine, 98. *Gammon* v. *Everett*, 25 Maine, 66. *Haxtun* v. *Bishop*, 3 Wend. 13. *Montgomery* v. *Elliott*, 6 Ala. 701. *Dougherty* v. *Western Bank*, 13 Ga. 287. *Bowie* v. *Duvall*, 1 Gill. & J. 175.

We think, therefore, that the refusal of the judge to rule as requested, that in order to maintain the action the plaintiff was bound to prove a demand at the office of Wilson, Colston and Company and that a refusal of a demand to pay the note at any other place did not constitute a default in the payment of the note, was correct, and that the judge was right in ruling, as he did, that a sufficient demand was made though not made at the office of Wilson, Colston and Company in Baltimore. The note is dated and apparently was made in New York. But it was given in renewal of a note previously held by Wilson, Colston and Company and was to be paid in Baltimore, and, it fairly may be inferred, was delivered to the plaintiff bank at its usual place of business in Annapolis. It must be regarded, therefore, either as a New York or Maryland contract. If it is to be regarded as a Maryland contract then the decisions by the highest court in that State which were put in by the plaintiff bank would seem to show, so far as they bear upon the question, that a demand at the office of Wilson, Colston and Company was not necessary in order to enable the plaintiff to maintain its action. *Bowie* v. *Duvall*, 1 Gill & J. 175. No evidence was introduced as to the law of New York, and in the absence of such evidence it is to be assumed that the law of that State is the same as the law of this. *Hazen* v. *Mathews*, 184 Mass. 388.

The remaining question relates to the sale of the collateral. The defendant asked the judge to rule "that the relation of the

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Farmers National Bank holding the collateral pledged as security for the payment of the note declared upon and the makers of said note was that of trustee and *cestui que trust;* that the Farmers National Bank was in duty bound and has the burden to prove that when it sold said collateral to itself it paid, and has since accounted to the makers of said note for the full value thereof." The judge gave the first clause and refused the second. The defendant's contention is in substance that the plaintiff bank did not exercise that care in the sale of the collateral which in view of the relation that existed between it and the makers it was bound to exercise, and he seeks to hold the plaintiff bank accountable for the amount which he contends should have been received. We assume, without deciding, that this defence, which is in the nature of an equitable defence or remedy, is open to him in these proceedings, (*Jennings* v. *Moore*, 189 Mass. 197,) but we see no ground on which it can fairly stand. The collateral was sold November 8, 1893. There was ample evidence that the defendant Venner had been notified of the intention of the plaintiff bank to sell the collateral if the note was not paid or the $5,000 that was called for was not provided, or if the additional collateral demanded was not furnished. On October 31, preceding the sale, a notice of the date and place of sale was left at his office, by the Chemical National Bank of New York, acting for the plaintiff bank, and could have been found to have been received by him. On November 2, the plaintiff bank also sent him a notice of the date and place of sale, and on November 8, the day of sale, another notice of the time and place of sale was left by the Chemical National Bank at the defendant's office. It did not appear whether these last two notices were in fact received by the defendant before the sale. But as already observed there was evidence warranting a finding that he had previously received actual notice of the date and place of sale. There also was evidence, though not perhaps so satisfactory as it might have been, warranting a finding that notice of the sale was advertised in the New York Times, the Evening Post, the Journal of Commerce, and the Tribune. It was conceded that A. H. Muller and Son, through whom the bonds were sold, did the largest auction business of securities in New York City, and also, as already observed, that they were proper auctioneers,

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and that the place where the bonds were sold, which was at one of the regular auction sales of A. H. Muller and Son at the New York Real Estate salesroom, 111 Broadway, was a proper place. We do not see any ground on which it can be successfully contended that there was a lack of proper care and diligence on the part of the plaintiff bank in the sale of the collateral. The fact that the bonds were sold for very much less than bonds of the same issue had been sold for previously and were sold for subsequently, and the further fact, if such was the fact, that Mr. Quinlan, who bid off the bonds for the plaintiff bank, was the only bidder do not invalidate the sale. There is nothing to show that other bidders were not present, and mere inadequacy of price is not of itself sufficient ground for setting aside a foreclosure sale. *Austin* v. *Hatch*, 159 Mass. 198. *Stevenson* v. *Dana*, 166 Mass. 163. *Fennyery* v. *Ransom*, 170 Mass. 303. The note provided expressly that the pledgee might purchase at any sale of the collateral, and there is nothing, therefore, in the fact that the plaintiff bank was the purchaser to invalidate the sale. Neither do we think there is anything in the fact that the bonds with one exception never had been stamped as five per cent bonds but were advertised and sold as six per cent bonds which they originally were. They had been made five per cent bonds before they were pledged by the defendant, but he had never caused them to be stamped as such. And though he had called the attention of the plaintiff to the reduction in interest, and had suggested that it have the bonds properly stamped, i. e. stamped as five per cent bonds, there is nothing to show that he did anything more, or that he was not content that the bank should hold them and deal with them as six per cent bonds though they were in fact five per cent bonds. Nor is there anything to show what caused the bonds to sell for the price for which they did; or that the bank or its agents had or should have had any reason to suppose that the sale would be adversely affected, if it was so affected, if the bonds were advertised as six per cent bonds instead of five per cent bonds, or that it was the duty of the bank to cause them to be stamped as five per cent bonds. There was uncontradicted testimony that six per cent bonds of the same issue were sold at auction by the same auctioneers before and after the sale in question

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for the same price as the five per cent bonds, and both the bank and the auctioneers may well have supposed that it would make no difference whether the bonds were advertised and sold as six per cent or five per cent bonds. What rights or property the plaintiff bank acquired or became entitled to under the reorganization of the water works by virtue of the possession and ownership of the bonds cannot of course affect the validity of the sale.

It is to be observed, that although the defendant Venner had information of the sale shortly after it took place, and wrote to the plaintiff bank protesting against it, he took no steps to have it set aside until the bank sued to recover the balance due it, nearly six years afterwards.

A question as to whether the plaintiff was entitled to interest was raised at the trial by the defendant, but it has not been pressed and we therefore treat it as waived.

The result is that we think that the exceptions should be overruled.

So ordered.

F. H. Nash, (*A. F. Clarke* with him,) for Venner.

H. E. Bolles & B. D. Barker, for the Farmers National Bank.

JOHN McDONNELL *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Suffolk. March 8, 1906. — September 5, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Negligence, Employer's liability.

Whether an engineer in the boiler room of a car shop of a railroad company, who has the direction and control of his assistants and the firemen but has no power to hire or discharge them, and who starts and stops the engines, sees to the cleaning of them, the filling of the oil cups and the packing of the engines, and does other manual labor as required, can be found to be a person whose sole or principal duty is that of superintendence, *quaere*.

It is not evidence of a defect in a ladder about fifteen feet long used in the boiler room of a car shop with a concrete floor that it had V shaped points of iron at

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the bottom and that it slipped when used by the plaintiff and had done so once before.

It is not the duty of a railroad company to furnish a stationary ladder or one with hooks upon it in the boiler room of a car shop with a concrete floor maintained by the company.

An employer is not bound to furnish his workmen with the best possible appliances but only to exercise care in seeing that those which he furnishes are safe and proper for the use for which they are intended.

If a superintendent in the boiler room of a car shop with a concrete floor places a long ladder against a boiler and orders a fireman under his control to go up the ladder and shut off the steam, the slight act of assistance in placing the ladder is not an act of superintendence and does not relieve the fireman from looking to see that the ladder is placed safely before attempting to ascend it.

If a superintendent in the boiler room of a car shop with a concrete floor places a long ladder against a boiler and says to a fireman under his control "Go up the ladder and shut off that steam up there, that valve," and tapping him on the shoulder says "Go ahead Mac," this does not excuse the fireman for failing to attend to his own safety in going up the ladder before looking to see that it is placed firmly.

TORT for personal injuries received by the plaintiff on January 6, 1903, while in the employ of the defendant in the boiler room of its car shop in that part of Hyde Park called Readville, with a count at common law alleging that the defendant furnished the plaintiff with an unsafe and defective ladder with which to work, and counts under R. L. c. 106, § 71, cl. 1, 2, alleging respectively a defect in the ways, works or machinery of the defendant and negligence of a person in the service of the defendant entrusted with and exercising superintendence and whose sole or principal duty was that of superintendence. Writ dated March 16, 1903.

In the Superior Court the case was tried before *Holmes*, J. The plaintiff testified that he went to work for the defendant as a fireman about December 12, 1902, and worked in the boiler shop at the fire doors firing until January 6, 1903; that he was employed by one Pearson who was called the general foreman; that one Dutton was the chief engineer of the plant; that Dutton had charge of all the boilers and engines that were there; that the plaintiff did not see him do anything in particular except looking over the plant, that is, the steam plant, boilers and engines, steam pipes; that Dutton gave the plaintiff orders and directions and also gave orders to the firemen that were working with him; that there were three firemen on the day shift and four on the night; that the plaintiff always obeyed Dutton's

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orders; that he never saw any other men refuse anything Dutton asked them to do; that he heard him give orders to the other men, tell them what to do; that the orders he gave to the other men were obeyed; and that he never saw Dutton discharge any one. The duties performed by Dutton are stated in the opinion.

The plaintiff's account of the happening of the accident was as follows:

"On the 6th of January I was working at the fire doors in the boiler house about three o'clock in the afternoon and Dutton came over and he says — 'Go up the ladder and shut off that steam up there, that valve.' He also tapped me on the shoulder and he said — 'Go ahead Mac,' and I went and I got up. Mr. Dutton was standing right beside me at the front of the boiler. I went around to the ladder about eight or ten feet from where we were standing. I don't know how long the ladder had been there exactly. It might have been there a day or so. I am not sure just what time the ladder was put there. I saw it put there by Mr. Dutton. It was up against the side of the boilers and I went over to the ladder when I got the order and went up the same as I would any ladder. I went up — when I was just about getting off the ladder it went right from under me like that. When I made the move to the ladder he was facing toward the front of the boiler, just stood there in front of the boiler, you know, about eight or ten feet from the ladder. In the act of getting off the ladder the ladder slipped from under me and I came down. The ladder was long, I should say fourteen or fifteen feet long and probably more. I never measured the ladder and was never up on it before and never had any occasion to use it and when I made the move to get off the ladder, the ladder went right from under me and I did not know anything, I went so quick, until I was on my back on the floor. I never saw any one going up on the ladder before myself, I never saw any one use the ladder before myself, but I know the ladder was used, I know the ladder had been there for that purpose I suppose. I didn't think of making any examination of the ladder because I started to go up the ladder, as I thought as the ladder was put there it was all right. I didn't think there was anything at all the matter with the ladder. I went up the ladder

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just the same as I would now if I was going to do anything. I didn't think of making any examination at all of the ladder. I saw when I put my hand on the ladder it was standing there on the concrete floor and I went up, I didn't think there was anything more to it."

Later the plaintiff testified "Dutton placed the ladder the minute before I went on the ladder," and also testified "Dutton came over from the ladder after placing the ladder that day, for me to go up on it, he came over to me and he told me to go up on the ladder then, and that is the time he gave me the order."

There was evidence that previously there had been a step ladder in the boiler room; and that about two days before the accident Dutton had taken the step ladder away and had brought the ladder in question into the boiler room; that this ladder was without any hooks or stays to hold it in place and had V shaped points of iron at the bottom or foot.

One Haudel testified that about two days before the accident he told Dutton that he would not go up on that ladder again: that when he was ready to go down on the ladder it slid away from him; and that Dutton only laughed at this.

One Karklin testified that he was in the defendant's employ when the foregoing conversation occurred, and heard Haudel tell Dutton that "the ladder wasn't safe, there was danger there," and "that he would not go up the ladder any more."

Dutton was called by the defendant and testified, on cross-examination, that he got this ladder in one of the defendant's shops; that he took it into the boiler room a few days before the accident and placed it against the brick wall for the use of the firemen; that this was the only ladder in the boiler room at the time of the accident which could be used by a person to go up and turn off the steam and that when he ordered any one to go up and shut off the steam "he would go on that ladder."

At the close of the evidence the judge ruled that on the evidence the plaintiff could not maintain his action on any count in his declaration, and ordered a verdict for the defendant. The plaintiff alleged exceptions.

C. Reno & J. P. Fagan, for the plaintiff.

J. L. Hall, for the defendant.

MORTON, J. We assume in favor of the plaintiff that the

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ladder was a part of the ways, works and machinery of the boiler room, and also, though with much more doubt, that Dutton was a person whose sole or principal duty was that of superintendence. He had charge of the engines and as engineer had the direction and control of his assistants and of the firemen, of whom the plaintiff was one. He started and stopped the engines, saw to the cleaning of them and the filling of the oil cups and the packing of the engines and did other manual labor as required. He had no power to hire or discharge his assistants or the firemen, and it would seem that his position was that of a superior servant performing manual labor as required in the proper discharge of his duties, and exercising such direction and control over his assistants and the firemen as was necessary to secure efficient service on their part, rather than that of one whose sole or principal duty was that of superintendence. But, however that may be, we think that there was no evidence of a defect in the ladder or of negligence on the part of Dutton. The only thing in respect to which it is contended that the ladder was defective is the V shaped irons on the bottom. There is nothing to show that this was not a usual and proper mode of construction adopted to prevent the ladder from breaking and wearing, or that the ladder as thus made was unsafe in the hands of a person exercising ordinary care. The fact that the ladder slipped, and had done so once before, was as consistent, to say the least, with a want of due care on the part of the plaintiff and the other person using it, as with a defect in the construction. The V shaped irons would seem to have rendered the ladder more secure instead of less so, if the person using it exercised proper care. It cannot be said as matter of law that the defendant was bound to furnish a stationary ladder or one with hooks upon it, and that it could be found guilty of negligence for not doing so. It was not bound to furnish the best possible appliances but only to exercise reasonable care in seeing that those which it furnished were safe and proper for the use for which they were intended. We see no evidence of negligence on its part in the performance of this duty. See *Nealand* v. *Lynn & Boston Railroad*, 173 Mass. 42; *Regan* v. *Donovan*, 159 Mass. 1; *Wood* v. *Tileston & Hollingsworth Co.* 182 Mass. 449.

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As to Dutton, all that he did was to place the ladder against the boiler and tell the plaintiff to go up and shut off the steam. The position in which the ladder stood was perfectly obvious to the plaintiff and he was at liberty to change it if he saw fit to. Dutton's act in placing the ladder against the boiler cannot fairly be regarded as anything more than a slight act of assistance to the plaintiff in doing that which Dutton had directed him to do. It cannot properly be regarded as an act of superintendence, or as relieving the plaintiff from himself looking to the placing of the ladder before he attempted to ascend it. Nor can the direction "Go up the ladder and shut off that steam up there, that valve" and tapping him on the shoulder and saying "Go ahead Mac" be regarded as excusing the plaintiff from such attention to his own safety. *Gouin* v. *Wampanoag Mills*, 172 Mass. 222. *Ruchinsky* v. *French*, 168 Mass. 68.

Exceptions overruled.

JOHN H. EDDY, administrator with the will annexed, *vs.* GEORGE O. FOGG & others.

Suffolk. March 21, 22, 1906. — September 5, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, BRALEY, & SHELDON, JJ.

Equity Pleading and Practice, Master's report, Appeal. *Bills and Notes. Pledge. Limitations, Statute of. Partnership. Equity Jurisdiction*, Accounting.

The denial of a motion, made after the filing of a master's report, that the master be ordered to report certain portions of the evidence, is generally within the discretion of the trial judge and will not be revised unless erroneous as matter of law.

The denial of a motion to recommit a master's report with directions to report upon certain matters specified in the motion is generally within the discretion of the trial judge and will not be revised unless erroneous as matter of law.

In a suit in equity the order of procedure is entirely within the discretion of the trial judge, and there is nothing erroneous in hearing a motion that a master who has filed a report be ordered to report certain portions of the evidence and a motion to recommit the master's report with directions to report upon certain matters specified in the motion at the same time that a motion to confirm the master's report is heard.

Where the evidence is not reported the findings of a master on matters of fact

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cannot be revised, and on an appeal from a decree confirming the report the only question open is whether there is anything in the facts found by the master which requires a different conclusion from that expressed by the decree.

The holder of a negotiable promissory note secured by collateral may pledge the note with its collateral to secure his own note, and the pledgee thereby becomes the holder of the pledged note with the right to collect it either by an action or by a sale of the collateral or both.

On the dissolution of a partnership the right to an accounting accrues, and a bill in equity for an accounting between the partners filed more than six years after such dissolution is barred by the statute of limitations.

MORTON, J. This is a bill, by the administrator with the will annexed of the estate of Charles W. Holden, for an accounting in respect to various transactions between the plaintiff's testator and the defendant Fogg. The other defendants are only stakeholders. The case was sent to a master under the usual rule to hear the parties and report his findings with such facts and questions of law as either party might request. The plaintiff filed exceptions to the master's report. A final decree was entered in the defendant Fogg's favor by which the plaintiff's exceptions were overruled and the report was confirmed. The plaintiff appealed from this decree. He also appealed from the overruling of motions, made by him after the report was filed, that the master be ordered to report certain portions of the evidence, and that the report be recommitted to the master with directions to report upon certain matters specified in the motion for recommittal.

If the motions thus made and overruled did not relate to matters entirely within the discretion of the judge who heard them, there is, nevertheless, nothing to show that the motions were wrongly overruled as matter of law. *Moore* v. *Dick*, 187 Mass. 207. *Bakshian* v. *Hassanoff*, 186 Mass. 255. *Henderson* v. *Foster*, 182 Mass. 447. *Silva* v. *Turner*, 166 Mass. 407. *Bowers* v. *Cutler*, 165 Mass. 441.

The plaintiff was apparently content to go to a hearing before the master under the rule as it was issued.* And it was not till after the hearings before the master, which must have been somewhat protracted, were concluded, and the master had sub-

* The order of reference was made on April 15, 1905. The master was ordered "to proceed forthwith to hear the parties and their evidence and report his findings to the court on or before the first Monday of May next, together with such facts and questions of law as either party may request."

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mitted his draft report that any request or suggestion appears to have been made by the plaintiff that the testimony or any part of it should be reported. The report is long and elaborate and the judge who passed upon the motions may well have been of opinion after hearing all that the plaintiff had to say that justice did not require that the motions should be granted.

Neither do we see anything erroneous in the action of the judge in hearing the motions for recommittal and a report of the evidence at the same time with the motion for the confirmation of the master's report. The order in which the business before it should be dealt with was entirely in the discretion of the court.

This brings us to the exceptions to the report. The sixth exception has been waived. The remaining exceptions relate to the Central Bank note so called, to the alleged losses of the C. W. Holden Insurance Agency, in which Holden and Fogg were equal partners, one half of which it is contended should have been allowed the Holden estate, and to a quarter interest in Holden, Eddy and Company, the value of which the plaintiff contends should have been allowed by the master to Holden's estate.

The evidence not having been reported the master's findings in regard to matters of fact cannot be revised, and the only question before us is therefore whether there is anything in the facts found by the master which is inconsistent with or requires a conclusion different from that expressed in the decree. *Cleveland* v. *Hampden Savings Bank*, 182 Mass. 110. *O'Brien* v. *Murphy*, 189 Mass. 353.

1. The Central Bank note matter was briefly as follows: The defendant Fogg gave to the Central Bank his note for $7,500 and, as collateral security therefor, a note for $5,000 given to him by Eddy and a note for $2,510 given to him by Holden which Fogg indorsed waiving demand and notice, and for the payment of which, as Fogg notified the bank and as the master has found, he held collateral security from Holden. The bank passed into the hands of a receiver who sued both Fogg and Holden on these notes. In the action against Fogg there was a finding in favor of the plaintiff for $1,417.16. Holden was defaulted in the action against him, and execution issued for

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$2,936.27 and costs. The plaintiff contends that Fogg had no right to hold the collateral, which he had received from Holden, as security for the $2,510 note aforesaid, and that he had no right to pledge the note with the collateral to the bank. But the master has expressly found that Fogg held the collateral as security for this note, and that he had a right to pledge the note and collateral to the bank, and that he continued to hold the collateral as security for the payment of the note and judgment. We see nothing to show that there was any error in these findings and rulings. It is clear that Fogg could pledge Holden's note as security for his own note and that the security given for Holden's note passed with it into the pledgee's hands, and that the pledgee could collect the Holden note by suit thereon or sale of the collateral or both. *Paine* v. *Furnas*, 117 Mass. 290. *Potter* v. *Thompson*, 10 R. I. 1. Dan. Neg. Instr. (3d ed.) §§ 833, 834. 1 Ames, Bills & Notes, 324 n. The decree fully protects Holden and his estate in respect to the $2,510 note and the judgment and execution obtained by the receiver thereon.

2. As to one half of the losses of the C. W. Holden Insurance Agency, which, it is contended by the plaintiff, should be allowed by the defendant, the master finds that if there was any such right of recovery it accrued on July 1, 1897, and therefore is barred by the statute of limitations. We think that the master was right and we agree with him not only in regard to the statute of limitations but also in his construction of the partnership agreement. The agreement was entered into on May 10, 1897, and the partnership was dissolved by mutual consent on June 21, 1897, and Holden transferred all his interest in the firm to Fogg. Holden's right to an accounting and settlement accrued upon the dissolution of the firm. *Farnam* v. *Brooks*, 9 Pick. 212. *Johnson* v. *Ames*, 11 Pick. 173. *Currier* v. *Studley*, 159 Mass. 17. *St. Paul's Church* v. *Attorney General*, 164 Mass. 188. There was nothing in the relations between him and Fogg to postpone it either at law or in equity. Moreover the master finds, in considering another item, that on or about May 23, 1904, Fogg and Holden had an accounting concerning losses of the business previous to July 1, 1897, in which it was agreed by Holden and Fogg that there was due

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from the former to the latter $1,063.35 on account of such losses. This would seem to be inconsistent with the claim now made by the administrator. Still further, the master finds that a submission which was entered into between Holden and Fogg in November, 1904, and the award thereon covered "all matters between these parties growing out of the agency business as such [i. e. the firm business] as distinguished from the loans, advances and payments which the said Fogg made to and for the said Holden." Not only, therefore, by reason of the operation of the statute of limitations, but also by reason of the findings of the master in regard to these matters, is the claim of Holden in regard to sums due him from Fogg on account of losses in the business conclusively disposed of in favor of Fogg.

3. The claim of the plaintiff to a quarter interest in Holden, Eddy and Company which he contends that the master should have allowed him, relates to a quarter interest in that concern which was sold by Fogg to Eddy. The plaintiff contends that it really belonged to Holden, and that it was held by Fogg in trust or as collateral for Holden's indebtedness to him. The master has however found that it belonged to Fogg absolutely, and that he did not hold it in trust or as collateral, and there is nothing to control these findings.

The result is that the decree must be affirmed.

So ordered.

W. N. Buffum, (*I. L. Rich* with him,) for the plaintiff.

F. H. Chase, for the defendant Fogg.

MARY A. MANNING & another *vs.* THADDEUS F. MULREY & others.

Suffolk. March 27, 1906. — September 5, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, BRALEY, & SHELDON, JJ.

Executor and Administrator. Equity Jurisdiction, Fraud, Laches. *Equity Pleading and Practice*, Commissioner to report evidence.

In a suit in equity by an heir at law of an intestate to set aside a conveyance of real estate made by the administrator of the estate of the intestate through a third person to himself and to recover the plaintiff's share in the real estate

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thus conveyed, there was evidence that the administrator represented the estate to be insolvent and was licensed to sell the real estate for payment of debts, that by previous arrangement he sold and conveyed the real estate for the nominal sum of $500 to the third person who as part of the same transaction conveyed it to the administrator in his own right for the same nominal price, that no money passed in the transaction, that the administrator filed a first and final account in which he charged himself with $500 as the proceeds of the real estate, that it was inventoried at $2,700, and he credited himself with payments and charges to the amount of $1,245.44, stating a balance due him of $700.44, that after due notice the account was allowed by a decree of the Probate Court more than twenty-two years before the filing of the plaintiff's bill, that the plaintiff was the niece of the administrator and her relations to him were such as to lead her to repose confidence in him and refrain from inquiry, that she had no more than constructive notice of the allowance of the administrator's account and did not know that the real estate had been conveyed to him until his death about one year and two months before the filing of the bill, supposing that he had had charge of the real estate as administrator of the estate of the intestate who also was her uncle, having been the brother of the administrator. The judge who heard the case upon oral testimony made a decree for the plaintiff, and the defendants, who claimed the real estate as devisees under the will of the administrator, appealed. *Held*, that the evidence warranted a finding that the sale by the administrator to himself was in fraud of the plaintiff's rights and therefore was void; that there could have been found to be actual fraud on the part of the administrator, and that the defendants could not be permitted to charge the plaintiff for sums expended by their testator in the payment of taxes or otherwise in the preservation of the real estate in question, these expenditures having been made in furtherance of his fraud; *also*, that the evidence warranted a finding that the plaintiff was not guilty of laches; and that the decree should be affirmed.

In a case of actual fraud mere delay on the part of the defrauded party seeking relief in equity, especially where there has been no change in the situation of the parties in respect to the matter in which the relief is sought, will not deprive him of his right to relief if until a short time before filing his bill he was ignorant of the fraud and had no knowledge of facts which in the exercise of reasonable prudence ought to have put him on inquiry.

In a suit in equity the allowance or denial of a motion for the appointment under Chancery Rule 35 of a commissioner to take and report the evidence is within the discretion of the judge hearing the case.

MORTON, J. One Michael Mulrey of Boston died intestate, unmarried and without issue in July, 1876, seised in fee of certain real estate situate in that part of Boston known as West Roxbury, and leaving, as his heirs at law, the plaintiff Carberry, the only child of a deceased brother James, the plaintiff Manning, two brothers John Mulrey and Michael S. Mulrey, children of a deceased brother Patrick, and a brother Timothy D. Mulrey, the father of the defendants. The brother Timothy was duly appointed administrator. He represented the estate to be in-

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solvent and in November, 1879, was duly licensed to sell the real estate for payment of debts and sold and conveyed the same as such administrator, by previous arrangement, to one Dowd for the nominal sum of $500. Dowd as part of the same transaction conveyed the property to Timothy in his own right also for the nominal sum of $500. No money passed from Dowd to the administrator or from the latter to the former. At least there was evidence warranting such a finding. Timothy D. Mulrey died on June 11, 1901, leaving a will by which he devised the real estate in question to the defendants. The plaintiffs are heirs at law of Michael, and this bill, filed on August 21, 1902, has been brought to set aside, so far as they are concerned, the conveyances from Timothy as administrator to Dowd and from Dowd to Timothy, and to recover the plaintiffs' shares of the real estate thus conveyed. There was a demurrer which was overruled without prejudice to the right of the defendants to raise the same questions at the trial upon the merits. The defendants appealed but have not argued the demurrer, being apparently content to argue the same questions on the merits which they could properly do. We therefore treat the demurrer as waived. The bill was dismissed as to the plaintiff Manning, and a decree was entered in favor of the plaintiff Carberry from which also the defendants appealed. No appeal was taken from the decree dismissing the bill as to the plaintiff Manning. Since the bill was brought the defendant Thaddeus F. Mulrey has died intestate, unmarried, and without issue leaving one John R. Mulrey, a brother, as one of his heirs at law. John R. Mulrey was admitted on his petition as a party defendant, and after a hearing, which was the second hearing in the case, the bill was dismissed as to him. No appeal was taken from this decree. When Timothy was appointed administrator, he was also guardian of the plaintiff Carberry. It did not appear that he ever rendered any account as such guardian. On December 19, 1879, he rendered a first and final account as administrator, which after due notice was allowed by the Probate Court on January 12, 1880. In this account he charged himself with $500 as the proceeds of the real estate. It was inventoried at $2,700. And he was allowed payments and charges to the amount of $1,245.44, leaving a balance due him of $700.44.

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The plaintiff Carberry testified, amongst other things, that she never knew that the land was Timothy D. Mulrey's till after his death; that she always supposed that it belonged to her uncle Michael's estate, and that her uncle Timothy had charge of it as administrator, and that her uncle Timothy never said anything to her about it nor she to him. All of the evidence was taken by a commissioner and is reported.

Without undertaking to review the evidence further we are of opinion that the presiding judge could have found that the sale by the administrator to himself was in fraud of the plaintiff Carberry's rights, and was therefore void. That, for aught that appears, is what he did find. It cannot be said that such a finding was clearly erroneous. *Regester's Sons Co.* v. *Reed*, 185 Mass. 226. *Dickinson* v. *Todd*, 172 Mass. 183. The defendants, assuming that the $500 with which the administrator charged himself is to be treated as proceeds of the sale, contend that the decree was erroneous in failing to allow them therefor, and also in failing to allow them for sums expended by the administrator in the payment of taxes and otherwise in the preservation of the estate. But the case is not that *simpliciter* of a purchase by a trustee of property belonging to his cestuis. There was, or could have been found to be, actual fraud on the part of the administrator. And neither his estate nor the defendants who stand in his shoes can be permitted to charge the plaintiff with sums paid and expenditures made in furtherance of his fraud.

Neither do we see how the plaintiff Carberry can be held as matter of law as the case stands to have been guilty of laches. A case of actual fraud stands differently from a case of a conveyance by a trustee to himself *simpliciter*. In a case of actual fraud mere delay, especially if unaccompanied by any change in the situation of the parties in respect of the matter in which relief is sought, will not deprive the defrauded party of the right to relief, so long as he remains ignorant of the fraud and has not such knowledge of facts as ought in the exercise of reasonable prudence to put him on inquiry. *Potter* v. *Kimball*, 186 Mass. 120. *Dunning* v. *Bates*, 186 Mass. 123. *Abbott* v. *Downs*, 168 Mass. 481. *Meader* v. *Norton*, 11 Wall. 442. *Vane* v. *Vane*, L. R. 8 Ch. 383. *Moxon* v. *Payne*, L. R. 8 Ch. 881. Perry on Trusts, (4th ed.) § 230. 18 Am. & Eng. Encyc. of

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Law, (2d ed.) 115. In the present case the plaintiff Carberry testified that she did not know that the land had been conveyed to the administrator till after his death and that she supposed he had charge of it as administrator of her uncle Michael's estate. According to her testimony nothing occurred to put her upon inquiry. It does not appear that she had anything more than constructive notice of the account that was filed and allowed. It also could have been found that her relations with the administrator were such as to lead her to repose confidence in him and to refrain from inquiry. On the whole, though the matter is not free from doubt, we do not see that it can be said that the presiding judge erred as matter of law in finding, as he must have found, that the plaintiff was not guilty of laches. The facts in *Lindsey* v. *Fabens*, 189 Mass. 329, and in *Sawyer* v. *Cook*, 188 Mass. 163, differed materially from those in the case before us.

The defendants Mary, Elizabeth and Catherine further contend that the decree was erroneous in requiring them to convey to the plaintiff Carberry an undivided third. They base this contention on the fact that an undivided twelfth of the estate has passed by the death of Thaddeus to John and that, after a hearing which was granted to John on his petition after the case had been heard as to the other defendants, the bill was dismissed as to him. The grounds on which this action was taken do not appear, and therefore we do not see how it can be said that the decree was erroneous in ordering the other defendants to convey a third to the plaintiff Carberry.

The allowance or disallowance of the motion made by the defendants after the second hearing for the appointment of a commissioner to report the evidence taken at such hearing was clearly a matter within the discretion of the presiding judge. See *Silva* v. *Turner*, 166 Mass. 407.

Decree affirmed.

P. H. Kelley, for the defendants.

J. F. Cronin, for the plaintiff Carberry.

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CLARENCE B. MALOON *vs.* EDMUND H. BARRETT.

Essex. May 17, 1906. — September 5, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Agency. Broker.

The owner of a house employed a real estate broker to sell it for him but instructed him not to advertise it. The broker forgot the instruction and in good faith advertised the house for sale. Solely as a result of the advertisement a person who had read it went to the owner, informed him that he had seen the advertisement and offered to buy the house, which the owner thereupon sold to him. In an action by the broker for a commission on the sale, it was *held*, that the owner by accepting the customer and selling him the house ratified the act of the broker in advertising the house for sale and was liable for the commission.

CONTRACT to recover $27 as a broker's commission for the sale of certain real estate in Lynn. Writ in the Police Court of Lynn dated October 28, 1905.

On appeal to the Superior Court the case was submitted to *Aiken*, C. J., upon an agreed statement of facts, signed by counsel, which was as follows:

The plaintiff is engaged in business as a real estate broker in the city of Lynn. Some time before October, 1905, the defendant placed in the hands of the plaintiff for sale a house belonging to the defendant on Robinson Street in Lynn. At the time the property was placed in the hands of the plaintiff, the plaintiff was directed not to advertise the property for sale in any newspaper. The plaintiff had the property for sale for some months without finding any purchaser, and then advertised the property for sale in a newspaper called the Lynn Item, together with other property owned by people other than the defendant. As soon as the defendant learned that the property was being advertised, he made objection to the plaintiff on the ground of his direction, and the plaintiff withdrew the advertisement after it had appeared twice. At the time of the advertisement the plaintiff had no recollection of the direction, and has none now. Later, one Everett Arbing, who saw the adver-

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tisement in the paper, and who learned thereby that the property was for sale, went to the defendant solely as a result of the advertisement, and informed the defendant that he had seen the advertisement and that he desired to purchase the property. The defendant at first said that he had concluded not to sell the property, but later in the same conversation the defendant and Arbing agreed together as to the sale and purchase of the property, and the defendant sold the property to Arbing for $1,350. The plaintiff had no connection with the sale except as above stated. It is agreed that the plaintiff's commission on the sale, if he is entitled to any commission, is two per cent, or $27.

Upon the foregoing statement of facts the Chief Justice ruled that the plaintiff was entitled to recover, and ordered that judgment be entered for the plaintiff in the sum of $27 damages; and the defendant appealed. At the request of the parties the Chief Justice reported the case for determination by this court. If the foregoing ruling was right, judgment was to be entered for the plaintiff as above stated; otherwise, judgment was to be entered for the defendant.

The case was submitted on briefs at the sitting of the court in May, 1906, and afterwards was submitted on briefs to all the justices.

H. T. Lummus & C. N. Barney, for the defendant.

A. B. Tolman, for the plaintiff.

LORING, J. The defendant's first contention is that the plaintiff would not have been entitled to a commission had there been no direction by the defendant not to advertise. It is stated in the agreed facts that the customer "went to the defendant solely as a result of said advertisement." That would have been decisive in favor of the plaintiff had there been no direction not to advertise the property. *Gleason* v. *Nelson*, 162 Mass. 245. *Dowling* v. *Morrill*, 165 Mass. 491. *Pratt* v. *Burdon*, 168 Mass. 596. *French* v. *McKay*, 181 Mass. 485.

The difficulty in the case at bar arises from the fact that the defendant told the plaintiff not to advertise. The plaintiff was employed to find a customer, but was instructed not to use an advertisement as a means of accomplishing that which he was employed to effect. For that reason the case does not come within cases like *Boston Ice Co.* v. *Potter*, 123 Mass. 28,

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Pittsburgh Plate Glass Co. v. *MacDonald*, 182 Mass. 593, and *Smith* v. *Wenz*, 185 Mass. 229.

Moreover it is agreed that the plaintiff had forgotten the restriction not to advertise. That is in substance an agreement that he acted in good faith, and for that reason this case does not come within *Sipley* v. *Stickney*, 190 Mass. 43, 44.

It has been urged on behalf of the defendant that inasmuch as the plaintiff's right to sell was not exclusive of the defendant he had a right to sell to Arbing without paying the plaintiff a commission. That is hardly an accurate statement of his rights. To be accurate, what the defendant would have had a right to do was to sell the property to Arbing without paying the plaintiff a commission if he had secured Arbing as a customer without the aid of the plaintiff. When Arbing went to the defendant solely as a result of the plaintiff's advertisement and informed the defendant that he had "seen the advertisement and that he desired to purchase the property," the possibility of the defendant's securing Arbing as a customer without the plaintiff's aid came to an end, and the defendant knew it. Whether the defendant was or was not harmed by that possibility being ended by the plaintiff's unauthorized act in advertising the property is and always will be a matter of conjecture. The defendant has not proved, and cannot prove, that had it not been for the unauthorized advertisement he would have secured Arbing as a customer.

When the possibility of the defendant's securing Arbing as a customer through his own (the defendant's) efforts was ended by the plaintiff's unauthorized advertisement, one of two results followed: Either (1) the defendant could sell to Arbing, although secured by the plaintiff's efforts, because the possibility of the defendant's securing Arbing as a customer had been brought to an end by the plaintiff's using an unauthorized means, that is to say, the defendant was in the same position that he would have been in had he in fact secured Arbing as a customer; or (2) the defendant (not having secured Arbing as a customer through his own efforts) could not sell to him as his (the defendant's) customer. In the latter case the defendant would not be bound to treat with Arbing as a customer, as he would have been bound to do had the means used by the plain-

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tiff been authorized; he could have refused to recognize him as a customer because obtained by the use of means which he forbade the use of. But in the latter case, if he elected to deal with him he dealt with him as a customer procured by the plaintiff, since he was in fact secured by the plaintiff, and not as a customer who became such through his own efforts; and having elected to deal with him he must be held to have ratified the means used by the plaintiff to secure him. That is to say, it is a case where the defendant had to accept or reject the plaintiff's action as a whole. He could not ratify it in part and repudiate it in part. *Suit* v. *Woodhall*, 113 Mass. 391. *Coolidge* v. *Smith*, 129 Mass. 554. *Eaton* v. *Littlefield*, 147 Mass. 122, 125.

In the opinion of a majority of the court it is not possible to say that the defendant had a right to deal with the customer in fact secured by the plaintiff, although by unauthorized means, as if he had been secured by his own efforts, and the second is the true view of the case.

The defendant having elected to deal with Arbing, the entry must be

Judgment on the finding.

SARAH E. TAYLOR, petitioner, *vs.* CORYDON C. WHITCOMB & another, executors.

Worcester. June 18, 1906. — September 5, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Widow. Executor and Administrator.

A petition under R. L. c. 140, § 2, seasonably filed, for an allowance to the widow of a testator may be granted although the previous payment of debts by the executors of his will before the expiration of a year from the time of their appointment has exhausted the estate and the granting of the petition will render it insolvent.

If an executor or administrator before the expiration of a year from the time of his appointment pays in full debts of his testator or intestate that are not preferred, thus exhausting the personal property of the estate so as to leave nothing in his hands with which to provide for an allowance to the widow under R. L. c. 140, § 2, and such an allowance afterwards is ordered by the Probate Court, such previous payments in full may be disallowed in his account.

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KNOWLTON, C. J. This is an appeal from a final decree of a single justice of this court, reversing a decree of the Probate Court which gave an allowance to the widow out of the personal estate of Samuel Taylor, deceased. Although there is some language in the report that is appropriate to a reservation of a case for the full court under R. L. c. 159, § 29, which may be made instead of entering a final decree, it appears that a report was asked for by the party against whom the decree was entered, and we must treat it as made under R. L. c. 159, § 23, which authorizes and requires a report to complete the record in such cases. *Worcester* v. *Lakeside Manuf. Co.* 174 Mass. 299, 300. *Cleveland* v. *Hampden Savings Bank*, 182 Mass. 110. *Crocker* v. *Crocker*, 188 Mass. 16.

The inventory showed personal estate to the amount of $136.78, which was afterwards increased to $657.16. This was found insufficient to pay the debts and expenses of administration, and the executors were licensed to sell all the real estate for the payment of the debts. The real estate brought the sum of $1,125. From the personal estate and the proceeds of the real estate the executors paid lawful debts of the testator to the amount of $1,671. They paid other debts, most if not all of which appear to have been valid, amounting to $45. There was also a charge of $50 for services of counsel and a charge of $50 for the executors as expenses of administration, which latter charge the justice found to be reasonable. He also found that by these payments the entire assets of the estate had been exhausted before the decree of the Probate Court, making an allowance to the widow, was entered.

The appellants conceded at the hearing before the single justice, "that if the decree of the Probate Court was valid, it should be affirmed, as the amount of the allowance was not excessive"; but they asked the justice "to rule that, because the entire estate had been exhausted by the executors in the payment of debts which could not be recovered back, and in reasonable charges of administration which had been incurred prior to said decree, the granting of which would render said estate insolvent, the petition should be dismissed." The justice so ruled, and entered a decree reversing the decree of the Probate Court. The appeal opens all questions of law and of

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fact which appear upon the record; but the particular question on which the decision turns is whether the decree of the Probate Court making the allowance was invalid by reason of the previous payment of debts which exhausted the estate.

It is found that the petitioner, at the time of her husband's death, was "nearly eighty-four years of age, feeble in health and unable to contribute to or earn her own living." She has never received anything from the estate of her husband, as legatee or otherwise. These facts, with no contradiction or explanation, even without the concession of the appellants, would make it the duty of the court to order an allowance for her, if there were personal estate from which it could be made. There is nothing in the case to affect adversely the petitioner's rights, except the payment of debts by the executors.

The statute, which is found in the R. L. c. 140, § 2, provides that "such parts of the personal property of a deceased person as the Probate Court, having regard to all the circumstances of the case, may allow as necessaries to his widow for herself, . . . shall not be taken as assets for the payment of debts, legacies or charges of administration." The term "personal property" means the personal property left by the deceased at the time of his death, and as to this property, upon the appointment of an executor or administrator, jurisdiction of the court attaches for the purpose of allowing to the widow as necessaries whatever she ought to receive. This property, to this amount, is set apart for her by the law, and it cannot be used for paying debts, legacies or charges of administration. The widow's rights under this statute cannot be taken away by hasty action of the executor or administrator in using the property for the payment of debts. It is not the personal property that is in the hands of the administrator at the time of filing the petition for an allowance which the law appropriates for the supply of necessaries; it is all that comes into his hands, so far as it may be needed under the decree of the court.

An executor or administrator cannot be sued for the recovery of an unpreferred debt or a legacy until the expiration of a year after his appointment, and ordinarily he ought not to pay debts until the expiration of that time. R. L. c. 141, § 1. If there is no doubt about the solvency of the estate, he properly may

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pay them earlier. But if he pays before the end of the year, he does it at his own risk in reference to the possibility that the estate may prove to be insolvent. *Hale* v. *Hale*, 1 Gray, 518, 523. His risk in this respect should apply to the estate that remains after turning over to the widow such part of the personalty as the Probate Court allows her for necessaries; and in paying debts before the end of the year, he is bound to know that the amount applicable to the payment of them is liable to be diminished by the making of an allowance.

In the present case the testator died on December 6, 1904. The executors of his will were his daughter and her husband. On February 7, 1905, they obtained from the Probate Court a license to sell all his real estate to pay his debts, and on March 28, 1905, the real estate was sold. The present petitioner received no notice and had no knowledge of these proceedings until after the sale was made. It appears from the papers in the case, which are made a part of the report, that of this indebtedness more than $800 in amount was upon notes of the testator running to his son in law, one of the executors. The widow's petition for an allowance was filed on April 12, 1905, about four months after the death of her husband, and notice thereof was duly given to the executors. They then, on April 26, 1905, filed a first and final account of their administration, showing that they had used all the assets in the payment of debts and charges of administration, and they relied upon the facts stated in it as a bar to the petition for a widow's allowance. Objection was made to the allowance of the account, and no hearing has yet been had upon it.

The widow's petition was filed within a reasonable time. *Lisk* v. *Lisk*, 155 Mass. 153. Her husband left personal property of which the court had jurisdiction, from which an allowance might properly be made to her, and nothing appears to meet the facts which show that an allowance should be made, except the fact that the executors, very quickly after the death of the testator, used all the personal estate in paying debts, a very large part of which were paid to one of themselves. This action did not deprive the widow of her rights or the court of its powers under the law. While the justice has found that payments were made as stated in the account, the account has not

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been allowed, and the court may hereafter disallow it on the ground that the payment in full of debts that were not preferred was not properly made. We are of opinion that the decree of the Probate Court was valid, and that the entry should be

Decree of Probate Court affirmed.

D. W. Haskins & M. M. Taylor, for the appellee.

C. A. Merrill, for the appellants.

MEMORANDA.

ON the eleventh day of September, 1906, the Honorable JOHN LATHROP resigned the office of justice of this court, which he had held since the twenty-eighth day of January, 1891.

On the twenty-sixth day of September, 1906, the Honorable ARTHUR PRENTICE RUGG was appointed a justice of this court, and on the first day of October, 1906, took his seat upon the bench at the sitting of the court at Worcester in the county of Worcester.

JOHN C. POLAND & others *vs.* WILLIAM F. BEAL & others.

Suffolk. March 20, 1906. — October 15, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Equity Pleading and Practice, Appeal. *Equity Jurisdiction*, To avoid circuity of action. *Contract*, For benefit of third person enforceable in equity.

On an appeal from a decree in equity where all the evidence is reported without any findings of fact the decree appealed from may be reversed if this court upon consideration of the evidence reaches a conclusion of fact different from that reached by the judge who made the decree.

If the owners of all the shares in a hotel, the legal title to which is in trustees under a declaration of trust, request the trustees in writing to accept a proposition to lease the hotel which contains a condition that laundry furnishings and kitchen fixtures shall be provided by the owners, and agree to furnish the money (not exceeding $4,000) necessary to provide for the kitchen and laundry furnishings and fixtures required under the terms of the proposition, and if the trustees show this letter to the persons offering to lease the hotel and also show

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it to a firm engaged in selling and installing laundry machinery who thereupon furnish the materials and labor required for the equipment of the laundry of the hotel and the lease is made, and if the bill for the laundry machinery thus furnished is approved by the trustees and its amount is within the limit fixed by the letter of the shareholders, the members of the firm who furnished the laundry machinery may maintain a suit in equity against the shareholders to compel them to pay the bill, their promise made to the trustees for the benefit of the plaintiffs being enforced directly to avoid circuity of action.

BILL IN EQUITY, inserted in a common law writ dated February 17, 1905, and filed on March 6, 1905, by John C. Poland, Edward F. Poland and John J. Mahoney, copartners doing business under the name of the Poland Laundry Machinery Company and engaged in selling, installing and dealing in laundry machinery, equipment and supplies, against William F. Beal of Boston and Arthur H. Bowditch of Brookline, the owners of all the shares of the Carlton Hotel Trust, created by a declaration of trust under which Leslie C. Wead, and Gordon Prince now deceased, were trustees, to enforce the payment of a bill for laundry furnishings and fixtures known as laundry machinery supplied to the Carlton Hotel, for the payment of which it was alleged that the defendants agreed to provide and to furnish the money.

In the Superior Court the case was heard by *Sheldon*, J. He appointed a commissioner under Chancery Rule 35 to take the evidence to be reported to this court, and made a final decree dismissing the bill. The plaintiffs appealed.

The letter of the defendants containing the promise for the benefit of the plaintiffs on which they relied was as follows:

"Boston, March 12, 1902.

"Leslie C. Wead and Gordon Prince, Trustees of the
Carlton Hotel Trust:

"Dear Sirs: —

"The undersigned, owners of all the shares issued by the trustees of the Carlton Hotel Trust, hereby request you to accept the proposition for a lease of the Carlton Hotel for a period of ten (10) years from October 1st, 1903, at an average annual net rental of twenty-five thousand (25,000) dollars, as contained in the letter from F. L. Dore and R. O. Hammond to Whitcomb, Wead & Co., dated March 10th, 1902, and we agree that we will furnish the money (not exceeding four thousand

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(4,000) dollars) necessary to provide for the kitchen and laundry furnishings and fixtures required under the terms of their proposition.

"And we further request that you will pay to Whitcomb, Wead & Co. a commission for negotiating the lease at the usual rate, amounting to twenty-five hundred (2500) dollars, such payment to be taken from the rentals as collected at the rate of five hundred (500) dollars per annum until the whole amount is paid. The lease shall be drawn in such usual form as may be acceptable to the trustees.

"Yours truly,
"William F. Beal.
Arthur H. Bowditch."

The case was argued at the bar in March, 1906, before *Knowlton*, C. J., *Morton*, *Lathrop*,* *Braley*, & *Sheldon*, JJ., and afterwards was submitted on briefs to all the justices except *Rugg*, J.

H. C. Fabyan, (*W. N. Poland* with him,) for the plaintiffs.

C. Hunneman, for the defendants.

BRALEY, J. This is an appeal in equity from a decree dismissing the plaintiffs' bill, and the case comes before us on a report of all the evidence, but without any findings of fact. It therefore becomes necessary to consider the evidence under the usual rule, that, where in equity a case has been tried and decided either in the Superior Court or by a single justice of this court, the decree from which the appeal is taken will not be reversed unless found to be plainly erroneous.

But this salutary rule of practice does not operate to prevent the full court, upon consideration of the evidence reported, from reaching a different conclusion. *Callanan* v. *Chapin*, 158 Mass. 113. *Goodell* v. *Goodell*, 173 Mass. 140. *Allen* v. *French*, 178 Mass. 589. *Colbert* v. *Moore*, 185 Mass. 227. *Fleming* v. *Cohen*, 186 Mass. 323, 325.

There being little, if any, conflict in the evidence upon the question involved, the credibility of witnesses ceases to be of importance, and giving to the defendants any benefit to which they may be entitled by force of the rule, we come directly to

* Mr. Justice Lathrop resigned before the case was decided.

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the principal issue of fact, namely, whether by a fair preponderance of the evidence the plaintiffs are shown to have furnished the materials and labor required for the equipment of the laundry within the scope of the authority conferred upon the trustees by the letter of the defendants Beal and Bowditch.

It clearly appears that the intended lessees wrote a letter to a firm of real estate brokers, containing a proposal to lease the trust estate for ten years at a specified rental, but as a part of their offer they required that certain laundry furnishings and kitchen fixtures should be provided by the owners. While this letter was not put in evidence, and it does not appear in what particular form these requirements were stated, yet the inference fairly is to be drawn that they were included in a general statement without any description of the several articles which composed the complete outfit which was required to enable them to carry on the hotel.

By the letter of the defendants, subsequently written, the trustees were requested to accept this offer, and, being the managers and in control of the property, it reasonably follows that by implication they also were requested to provide such furnishings and fixtures as had been specified.

It was uncontroverted that in response to this request the trustees informed the lessees of this offer, and exhibited the letter to them and to the plaintiffs. The lessees and the plaintiffs in accordance with these preliminary propositions then agreed upon certain articles which are described in the bill as "laundry furnishings and fixtures, known as laundry machinery," and the plaintiffs as a result of their conference with the trustees and lessees submitted to the former an estimate, including the price with the cost of installation, and this estimate was duly accepted. It is a warrantable inference naturally following from the situation and the conduct of the parties up to this time, that the contract with the plaintiffs which thereupon followed was entered into by the trustees, acting as managers of the property, and who also may be said to have represented the defendants, not only in accepting the terms of the proposed lease, but in providing the articles which had been called for by the lessees, by installing the "kitchen and laundry furnishings and fixtures required under the terms of their proposition." Neither was it

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disputed that in compliance therewith these articles were placed in the hotel, nor does it appear from the testimony that the defendants ever contended that the equipment so furnished did not meet the requirements of the lessees, or that it was in excess, or differed from the understanding by the defendants of the phrase, "laundry furnishings and fixtures" as used in their letter.

After the completion of the work, Wead, as surviving trustee, gave to the plaintiffs in writing his approval of their bill, with a statement that the materials which they had furnished were according to the contract, and that they were entitled to payment, whereupon interviews followed between the plaintiffs, the surviving trustee, and the defendant Bowditch.

If the testimony of Bowditch is accepted as correctly stating the substance of the interviews with him, he neither disputed the amount claimed as being incorrect, nor sought to avoid liability upon the ground that the articles furnished were not comprised within the terms of the offer made by his firm to the trustees.

While not conclusive upon this aspect of the case, it is also of significance that he testified, "I knew what the contracts were from these various items," even if the phrase used referred not only to the contract with the plaintiffs, but also to the other two contracts which also appeared in evidence, as these contracts showed an aggregate expenditure of something less than $4,000, which was the maximum limit fixed by the firm.

The only defence suggested in substance was that their agreement could not be enforced because, as this defendant informed them, the plaintiffs would be obliged to reach and apply the assets of the trust in payment of their bill.

From this review of the salient features of the evidence, it seems to us that the machinery which the plaintiffs furnished was provided under a contract made between them and the trustees, which conformed to the general terms and authorization contained in the letter submitted, and that from the inception of the negotiations to the close of the evidence at the trial all the parties in interest acted upon this assumption.

Having completed their contract, and the amount due therefor not being in dispute, there remains a question of law whether

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these defendants can now be compelled to advance out of the amount which they promised a sum sufficient to pay the plaintiffs. If, accompanying their proposition, the money which they had engaged to furnish had been placed in the hands of the trustees and retained for the purposes specified, there can be no doubt that the plaintiffs would be entitled to reimbursement therefrom, as to this extent it was intended to form a part of the available assets of the trust. But, this course not having been taken, the surviving trustee could maintain a bill in equity to compel payment to him of the sum which the defendants agreed to provide, especially where in reliance upon the credit of this promise he made a valid contract with the plaintiffs, and for the purpose of administering full relief, as all the parties are before the court, this result can be accomplished in the present suit. *Von Arnim* v. *American Tube Works*, 188 Mass. 515. *Andrews* v. *Tuttle-Smith Co.* 191 Mass. 461.

The decree of the Superior Court must be reversed, and a decree entered requiring the defendants Beal and Bowditch to pay to the plaintiffs the amount of their claim, with interest and costs.

Ordered accordingly.

EDWARD B. C. BAILEY *vs.* NEW BEDFORD INSTITUTION FOR SAVINGS, WALTER H. FAUNCE, administrator *de bonis non* with the will annexed, claimant.

Bristol. March 26, 1906. — October 15, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Gift. Savings Bank. Trust.

To pass the title to property by gift there must be a delivery and an acceptance actual or constructive.

A widow made a deposit in a savings bank in her name "in trust for E." E. was her nephew, whose first name at her request had been changed to that of her deceased husband. At the time of making the deposit she signed a declaration that no written trust existed, that the deposit was to be payable to her or her

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order during her life, and after her death to E. She made statements to E.'s father and mother and to other persons that she had remembered E. well and that she wanted him to have the money that she had deposited in the bank for him. She retained the possession and control of the bank book until her death, and left a will in which no provision was made for E. *Held*, that there was no evidence of a delivery and acceptance of a gift during the lifetime of the depositor or of anything tantamount to a delivery and acceptance, and that the deposit continued to be the depositor's as long as she lived and when she died passed to the executor of her will.

CONTRACT by Edward B. C. Bailey, a minor, by his guardian Lydia W. Bailey, to recover a deposit of $500 in the defendant entitled "Betsie B. Chase in trust for Edward B. C. Bailey." Writ dated March 1, 1904.

The defendant admitted that it held the deposit named in the declaration, and upon its motion Walter H. Faunce, administrator *de bonis non* with the will annexed of the estate of Betsie B. Chase, intervened as claimant and was made a party to the action.

At the trial in the Superior Court before *Holmes*, J. it appeared that the plaintiff lived in Middleborough and that Mrs. Chase, who made the deposit, lived in New Bedford, and died there on November 27, 1902; that Mrs. Chase had on deposit in her own name with the defendant on April 16, 1902, $641.49, and on that day deposited $358.51, making $1,000. This deposit was No. 107423. On April 16, 1902, she opened two new accounts with the defendant, namely, "Betsie B. Chase in trust for Arabella B. Robertson" being deposit No. 124115, and "Betsie B. Chase in trust for Edward B. C. Bailey" being deposit No. 124116, the one in suit. Deposit No. 124115 was closed by Mrs. Chase withdrawing it on August 23, 1902. Deposit No. 124116 remained intact up to the time of her death. Deposit No. 107423 was closed by the administrator. At the time of making the deposit in suit Mrs. Chase signed a statement such as was required by the bank in every case of a deposit in trust, as follows:

"New Bedford 4th mo. 16, 1902.

"Having deposited money in the New Bedford Institution for Savings as trustee for Edward B. C. Bailey as represented by Book No. 124116 I hereby declare that no written trust exists, and that by the terms of said trust said deposit and its additions

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and dividends is payable to me or my order during my life, and after my death to the said Edward B. C. Bailey.

"Witness, Betsie B. Chase.

"Carrie N. Ellis."

This statement remained in the custody and possession of the bank.

Luther S. Bailey, the father of the plaintiff, testified that the boy was born on April 13, 1897, and was named Robert; that when the plaintiff was six or eight months old the witness's sister, Betsie B. Chase, said that if they would let her name the boy she would make him a nice present of money, and the boy's name was changed to Edward Bevery Chase Bailey, Edward Bevery Chase having been the name of Mrs. Chase's husband, who died in January, 1896; that Mrs. Chase acted affectionately toward the boy; that in 1897 she made the boy a present of $30 and afterwards at two different times of $5 which was deposited by the witness in the Middleborough Savings Bank for the boy; that when the boy was five years old he was to have a birthday party to which Mrs. Chase was invited but did not come because she was sick and the party was given up by reason of the illness of the boy's mother; that about a week later the witness and his wife saw Mrs. Chase and in speaking of the birthday party she said "that she had not forgotten him; said she didn't send him any present but she hadn't forgot him"; that the first time the witness ever saw the deposit book No. 124116 was after the funeral of Mrs. Chase; that he was executor of Mrs. Chase's will until removed, and was succeeded by Frank A. Milliken as special administrator.

Lydia W. Bailey, the mother of the plaintiff, and appointed his guardian on December 14, 1903, testified that Mrs. Chase wanted the boy to have a birthday party when he was five years old, and was very anxious that he should because he had never had one; that she made arrangements for the party and Mrs. Chase was invited, but sent word that she was not able to come; that the witness was taken sick and the boy did not have the party; that about a week after April 13, 1902, the witness and her husband saw Mrs. Chase and she wanted to know if he had

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had the party and the witness told her "No"; that Mrs. Chase said she was sorry because she had told the people at New Bedford that he was going to have a party and the witness was never willing to do things for Edward; that she had remembered him and remembered him well; that the boy's name was changed because Mrs. Chase said that she should remember him well.

Mary A. Goodspeed, a sister of Betsie B. Chase, testified that she came from Brockton to New Bedford on July 8, 1902, and took care of her sister, who was sick in bed with a cancer, until she died; that during this time Mrs. Chase kept her bank books and other papers in a box under the head of her bed; that the box was kept locked and Mrs. Chase kept the key in a pocket book under her pillow most of the time, but always in her immediate custody and possession; that some time in July, 1902, Mrs. Chase had been making her will and among other things said to the witness that "she had deposited the money for Edward and she wanted him to have it"; that on August 23, 1902, she made her last will; and later in the same month she said "just the same, that she deposited the money for Edward and wanted him to have it, and she didn't care to change that part of it"; that shortly before she died "Mrs. Chase had a gold watch that was Mr. Chase's and I asked her if she was going to give it to Edward for his name, and she said No, that she had given it to Mr. Chase's nephew, that the money that she had put into the bank for Edward would be what she wanted him to have"; and that after Mrs. Chase died the witness delivered to the executor the box containing her books and papers, including the bank book in suit.

Mrs. Rebecca C. Reynolds, a neighbor of Mrs. Chase, testified that some time in the spring of 1902 she called upon Mrs. Chase and found Mrs. Lydia W. Bailey and the boy present and so declined to go in; that Mrs. Chase brought the boy to her and said, "this is the little boy I have named for my husband and he is to be remembered for his name."

Mrs. Lydia A. Tilden, another neighbor, who lived in another tenement in the same house with Mrs. Chase, testified that Mrs. Chase always spoke as though she thought a great deal of the boy; that he was named for her husband; that "Mrs. Chase

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said she was invited to a birthday party, and I said 'of course you are going,' and she said she didn't know as she would be able to go, and I didn't know whether she went or not, but I saw her three or four days later and asked her if she went and she said — No, she wasn't able to, but she had remembered him with a good substantial sum."

No provision was made for the plaintiff in Mrs. Chase's last will.

The claimant upon notice produced at the trial book No. 124116 representing the deposit in question.

The claimant objected to all the evidence of statements made by Mrs. Chase to the different witnesses, but they were admitted and the claimant excepted.

This was substantially all the evidence in the case.

At the close of the evidence and after hearing the parties, the judge was of opinion that not enough had been done to pass the title to the bank book and deposit to the plaintiff, and directed a verdict for the claimant. By agreement of the parties he reported the case for determination by this court. If upon the foregoing statement of the evidence a jury would be authorized to find a verdict for the plaintiff, the verdict was to be set aside and judgment was to be entered for the plaintiff in the sum of $567.94; otherwise, judgment was to be entered for the claimant.

The case was submitted on briefs at the sitting of the court in March, 1906, and afterwards was submitted on briefs to all the justices except *Rugg*, J.

A. Auger, for the plaintiff.

F. A. Milliken, for the claimant.

KNOWLTON, C. J. The money on deposit in the savings bank was originally the property of the testatrix, and there is no doubt that it remained hers up to the time of her death, unless there was a perfected gift of it to Edward B. C. Bailey in her lifetime. It is clear that the mere deposit of it in her name, as trustee for him, did not deprive her of her ownership and control of it. The statement signed by her at the time of making the deposit implies that it remained her property, and subject to her control, although it indicates an intention on her part that so much, if any, of the deposit as she allowed to remain

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there to the time of her death should become his property. But she could not pass the title to property after her death by such a deposit or by such a statement. Unless it passed in her lifetime, it did not pass at all. To pass property by a gift, there must be a delivery of it to the donee, and acceptance of it by him, or something which is equivalent to such a delivery and acceptance. This has been decided in many cases in which the question has arisen in reference to a deposit in a savings bank in the name of another, or as trustee for another. In *Brabrook* v. *Boston Five Cents Savings Bank*, 104 Mass. 228, 231, Mr. Justice Wells said: "There must be some act of delivery out of the possession of the donor, for the purpose and with the intent that the title shall thereby pass." "If the act of transfer be complete on the part of the donor, subsequent acceptance by the donee before revocation will be sufficient." In *Scrivens* v. *North Easton Savings Bank*, 166 Mass. 255, it is held that, in addition to what was written in the bank book, "The testator must have indicated to the plaintiff in some form of language that the deposit then belonged to him, although he could not have it until his father's death, and that this was assented to by him." In the opinion in *Alger* v. *North End Savings Bank*, 146 Mass. 418, 422, we find similar language. Other cases of like import are *Clark* v. *Clark*, 108 Mass. 522; *Ide* v. *Pierce*, 134 Mass. 260; *Nutt* v. *Morse*, 142 Mass. 1; *Sherman* v. *New Bedford Five Cents Savings Bank*, 138 Mass. 581; *Booth* v. *Bristol County Savings Bank*, 162 Mass. 455; *Welch* v. *Henshaw*, 170 Mass. 409; *Cleveland* v. *Hampden Savings Bank*, 182 Mass. 110; *McMahon* v. *Lawler*, 190 Mass. 343.

In the present case, although the testimony tends to show an intention of the testatrix that the boy Edward should have this money after her death, there is no evidence of a delivery and acceptance of a gift of it in her lifetime, or of anything tantamount to a delivery and acceptance. The property, therefore, remained hers so long as she lived, and passed to her executor after her death.

Judgment on the verdict.

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CLARENCE CARVILLE *vs.* COMMONWEALTH.

Worcester. October 2, 1906. — October 15, 1906.

Present: KNOWLTON, C. J., HAMMOND, LORING, & BRALEY, JJ.

Easement, By prescription. *Metropolitan Water Supply Act. Damages*, For property taken by statutory authority.

Where the owner of land on which there is a pond gives his son oral permission to cut ice upon the pond and afterwards the son erects ice houses and sells ice from the pond for a series of years, whether these acts of the son would warrant a finding that his use of the pond was adverse and not permissive, so that if continued for twenty years he might acquire an easement by prescription, *quaere*.

Where a petitioner for damages under a statute, for the taking by the right of eminent domain of an alleged easement in gross to maintain a certain pond for the purpose of cutting ice, shows that the land under the pond belonged to his father and that the petitioner a little more than nineteen but less than twenty years before the taking built a dam to raise the waters of the pond and shortly afterwards built ice houses there, the fact that during the year before the building of the dam the petitioner worked by odd jobs on the land does not show an exclusive occupation nor a use of the land for cutting and taking ice such as would mark the beginning of an adverse use and extend it to a period of twenty years.

Under St. 1895, c. 488, § 14, as amended by Sts. 1899, c. 342, 1900, c. 108, §§ 1, 2, 1901, c. 498, 1904, c. 186, a petition for damages for the taking by the metropolitan water commissioners of an alleged easement in gross to maintain a certain pond for the purpose of cutting ice, where by the same instrument of taking the land under the pond was taken, must be filed "within two years after the actual taking by right of eminent domain of such real estate or any interest therein," and the provisions of the amending statutes extending the period of limitation in the case of petitions for damages for the taking of water rights where no land is taken in connection with such water rights have no application.

PETITION, filed in the Supreme Judicial Court on October 19, 1903, and amended on December 23, 1903, and January 30, 1904, under St. 1895, c. 488, and acts in amendment thereof, for the assessment of damages for the taking by the metropolitan water board of Carville Pond in Clinton and an alleged prescriptive easement in gross claimed by the petitioner to maintain that pond for the purpose of cutting ice and for other purposes.

After the decision reported in 189 Mass. 273, the case was tried before *Braley*, J., who ruled that on all the evidence the

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origin in a set of rules adopted in January, 1905, by the Bricklayers' and Masons' International Union of America, to which the two unions here in question were subordinate. This set of rules contained a provision that bricklaying masonry should consist (*inter alia*) of "all pointing and cleaning brick walls," and that stone masonry should consist (*inter alia*) of the "cleaning and pointing of stone work." The practical working of the principles of brick and stone masonry as defined in these rules was left to the subordinate unions.

By the Constitution, By-Laws and Rules of Order of the Bricklayers' Union No. 3, it is provided that members shall not accept employment "where a difficulty exists in consequence of questions involving the rules which govern the Union," and that any member violating a law of the union shall on conviction "be reprimanded, suspended or fined at the discretion of the Union." No similar provision appears in the extract from the Constitution of the Stone Masons' Union which was in evidence, but it is not a violent assumption from the action of the masons and from the testimony of Walsh, the walking delegate of the Stone Masons' Union, that the members of the Masons' Union stood on the same footing as the members of the Bricklayers' Union in this respect.

In other words, the make-up of the two unions was such that any member of a subordinate union (which had adopted a working rule containing in substance the provisions of the working rules of the International Union as to cleaning and pointing buildings) who continued to work on a job on which a pointer was at work was liable to be reprimanded, fined or suspended.

This brings us to the action taken by the unions here in question.

There was an executive committee of the two unions. On July 28, 1905, this executive committee voted "that beginning September 18, 1905, no member of the Bricklayers' and Masons' unions of Boston and vicinity, will work on any building where the contractor will not agree to have the pointing done by bricklayers or masons."

This action of the executive committee was formally adopted by the Bricklayers' Union No. 3, and seems to have been informally adopted by the Stone Masons' Union No. 9. In pur-

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suance thereof the following circular letter was issued: "The Bricklayers' and Masons' Unions of Boston and vicinity have voted that no bricklayer or mason will work for any firm or contractor who will not employ bricklayers or masons to do the pointing of brick, terra cotta and stone masonry. This action to go into effect September 18, 1905."

In September, 1905, L. D. Willcutt and Son as general contractors were erecting (among other buildings) a stone building on the corner of Massachusetts Avenue and Boylston Street in Boston. On the eighteenth day of that month, Mr. L. D. Willcutt of that firm was notified that if he did not discharge the pointers who were working for his firm in pointing that building all the masons and bricklayers working for his firm on other buildings in Boston (all of whom were union men) would strike. Thereupon he suspended the work which was being done by the pointers on the building on the corner of Massachusetts Avenue and Boylston Street. This evidence was admitted to show that there was a general scheme that where pointing was given to any one beside union bricklayers and stone masons there would be a strike.

On November 13, 1905, the defendant Walsh, the walking delegate of the Stone Masons' Union No. 9, and the defendant Driscoll, the walking delegate of the Bricklayers' Union No. 3, came to the Ford Building, for which the corporation of L. P. Soule and Son Company were the general contractors, and found that the cleaning and the pointing of that building were being done under a contract between the owners of the building and Robert H. Pickett, one of the plaintiffs here. They then went to a brick building which was being erected by the L. P. Soule and Son Company as contractors, a cold storage warehouse on Eastern Avenue, and there Driscoll notified the men that the pointing at the Ford Building was being done by pointers. In consequence all the bricklayers employed by the L. P. Soule and Son Company on the cold storage building, fifty in all, being union men, struck work on that or the next day. The next day, November 14, Walsh went to a stone building which was being erected by the same corporation for the International Trust Company on the corner of Arch Street and Devonshire Street, and told the workmen there of the pointing on the Ford

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Building; whereupon all the stone masons working there, five or six in all, being union men, struck work.

This bill was filed in the Superior Court on November 21, 1905. It seems to have come on for hearing on December 5, 1905. As we have said, the evidence was taken by a commissioner, a final decree in favor of the plaintiffs on all three grounds was made on December 11, without any special findings of fact, and the case is here on appeal from that decree.

It appeared from the testimony of Parker F. Soule (an officer of the L. P. Soule and Son Company) that it was cheaper to make a contract with pointers for the work of pointing and cleaning than to employ stone masons and bricklayers to do that work. It appeared from other evidence that the wages of a bricklayer or stone mason were fifty-five cents an hour, while pointers are paid three dollars for a day of eight hours, or thirty-seven and one half cents an hour. It further appeared from Mr. Soule's testimony that he preferred to give the work to the pointers because in cleaning a building acid has to be used, and, if the acid is used to excess, stains are caused which in some instances it is impossible to "get out"; and that he did not think that the bricklayers and stone masons were competent to use these acids. He also preferred to give the work to the pointers because the work which is done by the pointers usually is done by contract, in which case the general contractor who employs the pointers is relieved from responsibility on account of accidents which may occur because of the fact that the work is done on a swinging stage, at times at great heights. Again it appeared from the evidence that L. P. Soule and Son Company were not the only contractors who thought that they got better work at a smaller cost and with less liability by making a contract with stone pointers for the doing of this work than by employing stone masons and bricklayers to do it.

All this was explained to the walking delegate of the Bricklayers' Union here in question at an interview between Mr. Soule and the walking delegate of that union held within two days of the strike. It also appeared that at that interview the delegate told Mr. Soule that, while it had been against the rules of the union that any member should take piece work, the taking of piece work recently had been allowed; whereupon Mr. Soule

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told him that "if he had any members of his union who were reliable men, whom we could have confidence enough in to let a contract to, who would give prices as low, . . . he would have no trouble in getting all the stone pointing there was going." No offer to make a contract on these terms was made, and on the evidence it must be assumed that there was nothing in this statement of the defendant Walsh.

It further appeared from the evidence that the brick and stone pointers of Boston applied to the Building Trades Council for a charter. It is stated in the record of the Brick Masons' Union No. 3, that "the said pointers about a year ago applied to the A. F. of L. for a charter, which was denied them, the American Federation of Labor taking the stand that brick and stone pointing was a part of the bricklayers' and masons' trade." On September 11, 1905, the Brick Masons' Union No. 3 voted to "file a protest to the B. T. C. against their granting a charter to the brick and stone pointers of Boston," and on September 18 it was voted "that this Committee [*sic*] send communication to B. T. C. requesting that body not to grant a charter to the so-called brick and stone pointers." It was admitted that the men engaged in the business of brick and stone pointers were not qualified for the business of bricklayers and stone masons.

There was evidence that at the interview between Driscoll and Mr. Willcutt, Mr. Willcutt told Driscoll that he did not believe that, when there were twelve hundred men in the union and thirty pointers outside, all this fuss was being made to get the pointers' work for the union men; that he thought it was "simply a question of dictation to us"; and on Mr. Willcutt's asking him (Driscoll) "Do you really want it or do you want to drive the men out of business?" Driscoll smiled and said: "That is a charitable way of looking at it."

There seem to be three causes of action upheld by the decree.

In the first place, Robert H. Pickett, one of the plaintiffs, had a contract with the owners of the Ford Building and was at work under it when the defendants struck. He seeks protection from a strike on L. P. Soule and Son Company to force the owners of the Ford Building to give this work to the unions

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and to take it away from him. Except for the fact of this contract, in which the plaintiff Robert H. Pickett alone was concerned, the first and second causes of action are alike.

The second cause of action consists in the effort of all the plaintiffs to be protected from being discharged or not employed by the L. P. Soule and Son Company because the defendants struck work for that corporation so long as that corporation worked on a building on which Robert H. Pickett was employed by the owners of that building.

Finally, the plaintiffs sought to be protected against a strike by the defendants in order to get the work of pointing for the members of their unions.

No objection has been taken to the bill on the ground of multifariousness. We therefore shall consider all three causes of action.

We will consider first the last of the three causes of action.

The question, so far as this the third cause of action goes (apart from a question of fact which we will deal with later on), is whether the defendant unions have a right to strike for the purpose for which they struck; or, to put it more accurately and more narrowly, it is this: Is a union of bricklayers and stone masons justified in striking to force a contractor to employ them by the day to do cleaning and pointing at higher wages than pointers are paid, where the contractors wish to make contracts with the pointers for such work to be done by the piece because they think they get better work at less cost with no liability for accidents, and where the pointers wish to make contracts for that work with the contractors on terms satisfactory to them?

In other words, we have to deal with one of the great and pressing questions growing out of the existence of the powerful combinations, sometimes of capital and sometimes of labor, which have been instituted in recent years where their actions come into conflict with the interests of individuals. The combination in the case at bar is a combination of workmen, and the conflict is between a labor union on the one hand and several unorganized laborers on the other hand.

It is only in recent years that these great and powerful combinations have made their appearance, and the limits to which

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they may go in enforcing their demands are far from being settled.

It is settled however that laborers have a right to organize as labor unions to promote their welfare.

Further, there is no question of the general right of a labor union to strike.

On the other hand it is settled that some strikes by labor unions are illegal. It was held in *Carew* v. *Rutherford*, 106 Mass. 1, that a strike by the members of a labor union was illegal when set on foot to force their employer to pay a fine imposed upon him by the union of which he was not a member, for not giving the union all his work. To the same effect see *March* v. *Bricklayers' & Plasterers' Union No. 1*, 79 Conn. 7. Again, it was held in *Plant* v. *Woods*, 176 Mass. 492, that a labor union could not force other workmen to join it by refusing to work if workmen were employed who were not members of that union. To the same effect see *Erdman* v. *Mitchell*, 207 Penn. St. 79; *O'Brien* v. *People*, 216 Ill. 354; *Loewe* v. *California State Federation of Labor*, 139 Fed. Rep. 71. And see in this connection *Giblan* v. *National Amalgamated Labourers' Union*, [1903] 2 K. B. 600.

When and for what end this power of coercion and compulsion commonly known as a strike may be legally used is the question which this case calls upon us to decide. In the present state of the authorities it becomes necessary to consider the general principles governing labor unions and strikes by labor unions.

The right of laborers to organize unions and to utilize such organizations by instituting a strike is an exercise of the common law right of every citizen to pursue his calling, whether of labor or business, as he in his judgment thinks fit. It is pointed out in *Carew* v. *Rutherford*, 106 Mass. 1, 14, that in the earlier days of the colony the government undertook to control the conduct of labor and business to some extent, but that later this policy of regulation was abandoned and all citizens were left free to pursue their calling, whether of labor or business, as seemed to them best. This common law right was raised to the dignity of a constitutional right by being incorporated in the Constitution of the Commonwealth. So far as the question now before us goes it is of no consequence whether

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the right to pursue one's calling (whether it be of labor or of business) is a common law right or a constitutional right, since the violation of it here complained of is on the part of individuals and not on the part of the Legislature. What is of consequence here is that such a right exists. In article 1 of the Declaration of Rights it is declared that "All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of . . . acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness." It is in the exercise of this right that laborers can legally combine together in what are called labor unions.

This right of one or more citizens to pursue his or their calling as he or they see fit is limited by the existence of the same right in all other citizens. The right and the result are accurately stated by Sir William Erle in his book on Trade Unions in these words: "Every person has a right under the law, as between him and his fellow subjects, to full freedom in disposing of his own labor or his own capital according to his own will. It follows that every other person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others": cited by this court in *Plant* v. *Woods*, 176 Mass. 492, 498.

We now have arrived at the point where a labor union, being an organization brought about by the exercise on the part of its members of the right of every citizen to pursue his calling as he thinks best, is limited in what it can do by the existence of the same right in each and every other citizen to pursue his and their calling as he or they think best.

In addition to the limitation thus put on labor unions there is a fact which puts a further limitation on what acts a labor union can legally do. That is the increase of power which a combination of citizens has over the individual citizen. Take for example the power of a labor union to compel by a strike compliance with its demands. Speaking generally a strike to be successful means not only coercion and compulsion but coercion and compulsion which, for practical purposes, are irresistible. A successful strike by laborers means, in many if not

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in most cases, that for practical purposes the strikers have such a control of the labor which the employer must have that he has to yield to their demands. A single individual may well be left to take his chances in a struggle with another individual. But in a struggle with a number of persons combined together to fight an individual the individual's chance is small, if it exists at all. It is plain that a strike by a combination of persons has a power of coercion which an individual does not have.

The result of this greater power of coercion on the part of a combination of individuals is that what is lawful for an individual is not the test of what is lawful for a combination of individuals; or to state it in another way, there are things which it is lawful for an individual to do which it is not lawful for a combination of individuals to do. Take for example the example put in *Allen* v. *Flood*, [1898] A. C. 1, 165, of a butler refusing to renew a contract of service because the cook was personally distasteful to him, whereupon, in order to secure the services of the butler, the master refrains from re-engaging the cook whose term of service also had expired. We have no doubt that it is within the legal rights of a single person to refuse to work with another for the reason that the other person is distasteful to him, or for any other reason however arbitrary. But it is established in this Commonwealth that it is not legal (even where he wishes to do so) for an employer to agree with a union to discharge a non-union workman for an arbitrary cause at the request of the union. *Berry* v. *Donovan*, 188 Mass. 353. *A fortiori* the members of a labor union cannot by a strike refuse to work with another workman for an arbitrary cause. For the general proposition that what is lawful for an individual is not necessarily lawful for a combination of individuals see *Quinn* v. *Leathem*, [1901] A. C. 495, 511; *Mogul Steamship Co.* v. *McGregor*, 23 Q. B. D. 598, 616; *S. C.* on appeal, [1892] A. C. 25, 45; *Gregory* v. *Brunswick*, 6 M. & G. 205; *S. C.* on appeal, 3 C. B. 481. It is in effect concluded by *Plant* v. *Woods*, 176 Mass. 492.

These being the general principles, we are brought to the question of the legality of the strike in the case at bar, namely, a strike of bricklayers and masons to get the work of pointing,

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or, to put it more accurately, a combination by the defendants, who are bricklayers and masons, to refuse to lay bricks and stone where the pointing of them is given to others. The defendants in effect say we want the work of pointing the bricks and stone laid by us, and you must give us all or none of the work.

The case is one of competition between the defendant unions and the individual plaintiffs for the work of pointing. The work of pointing for which these two sets of workmen are competing is work which the contractors are obliged to have. One peculiarity of the case therefore is that the fight here is necessarily a triangular one. It necessarily involves the two sets of competing workmen and the contractor, and is not confined to the two parties to the contract, as is the case where workmen strike to get better wages from their employer or other conditions which are better for them. In this respect the case is like *Mogul Steamship Co.* v. *McGregor*, 23 Q. B. D. 598; *S. C.* on appeal [1892] A. C. 25.

The right which the defendant unions claim to exercise in carrying their point in the course of this competition is a trade advantage, namely, that they have labor which the contractors want, or, if you please, cannot get elsewhere; and they insist upon using this trade advantage to get additional work, namely, the work of pointing the bricks and stone which they lay. It is somewhat like the advantage which the owner of back land has when he has bought the front lot. He is not bound to sell them separately. To be sure the right of an individual owner to sell both or none is not decisive of the right of a labor union to combine to refuse to lay bricks or stone unless they are given the job of pointing the bricks laid by them. There are things which an individual can do which a combination of individuals cannot do. But having regard to the right on which the defendants' organization as a labor union rests, the correlative duty owed by it to others, and the limitation of the defendants' rights coming from the increased power of organization, we are of opinion that it was within the rights of these unions to compete for the work of doing the pointing and, in the exercise of their right of competition, to refuse to lay bricks and set stone unless they were given the work of pointing them when laid.

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See in this connection *Plant* v. *Woods*, 176 Mass. 492, 502; *Berry* v. *Donovan*, 188 Mass. 353, 357.

The result to which that conclusion brings us in the case at bar ought not to be passed by without consideration.

The result is harsh on the contractors, who prefer to give the work to the pointers because (1) the pointers do it by contract (in which case the contractors escape the liability incident to the relation of employer and employee); because (2) the contractors think that the pointers do the work better, and if not well done the buildings may be permanently injured by acid; and finally (3) because they get from the pointers better work with less liability at a smaller cost. Again, so far as the pointers (who cannot lay brick or stone) are concerned, the result is disastrous. But all that the labor unions have done is to say you must employ us for all the work or none of it. They have not said that if you employ the pointers you must pay us a fine, as they did in *Carew* v. *Rutherford*, 106 Mass. 1. They have not undertaken to forbid the contractors employing pointers, as they did in *Plant* v. *Woods*, 176 Mass. 492. So far as the labor unions are concerned the contractors can employ pointers if they choose, but if the contractors choose to give the work of pointing the bricks and stones to others the unions take the stand that the contractors will have to get some one else to lay them. The effect of this in the case at bar appears to be that the contractors are forced against their will to give the work of pointing to the masons and bricklayers. But the fact that the contractors are forced to do what they do not want to do is not decisive of the legality of the labor union's acts. That is true wherever a strike is successful. The contractors doubtless would have liked it better if there had been no competition between the bricklayers' and masons' unions on the one hand and the individual pointers on the other hand. But there is competition. There being competition, they prefer the course they have taken. They prefer to give all the work to the unions rather than get non-union men to lay bricks and stone to be pointed by the plaintiffs.

Further, the effect of complying with the labor unions' demands apparently will be the destruction of the plaintiffs' business. But the fact that the business of a plaintiff is destroyed

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by the acts of the defendants done in pursuance of their right of competition is not decisive of the illegality of the acts. It was well said by Hammond, J. in *Martell* v. *White*, 185 Mass. 255, 260, in regard to the right of a citizen to pursue his business without interference by a combination to destroy it: "Speaking generally, however, competition in business is permitted, although frequently disastrous to those engaged in it. It is always selfish, often sharp, and sometimes deadly."

We cannot say on the evidence that pointing is something foreign to the work of a bricklayer or a stone mason and therefore something which a union of bricklayers and stone masons have no right to compete for or insist upon, and so bring the case within *Carew* v. *Rutherford*, 106 Mass. 1; *March* v. *Bricklayers & Plasterers Union No. 1*, 79 Conn. 7; and *Giblan* v. *National Amalgamated Labourers' Union*, [1903] 2 K. B. 600. On the contrary the evidence shows that in Boston the pointing is done to some extent by bricklayers and stone masons, and there is no evidence that the trade of pointers exists outside that city.

The protest of the defendant unions against the plaintiffs being allowed to organize a pointers' union is not an act of oppression. It is not like the refusal of the union in *Quinn* v. *Leathem*, [1901] A. C. 495, to work with the non-union men or to admit the non-union men to their union. The defendants' unions are not shown to be unwilling to admit the plaintiffs to membership if they are qualified as bricklayers or stone masons. But the difficulty is that the plaintiffs are not so qualified. They are not bricklayers or masons. The unions have a right to determine what kind of workmen shall compose the union, and to insist that pointing shall not be a separate trade so far as union work is concerned. They have not undertaken to say that the contractors shall not treat the two trades as distinct. What they insist upon is that if the contractors employ them they shall employ them to do both kinds of work.

The application of the right of the defendant unions, who are composed of bricklayers and stone masons, to compete with the individual plaintiffs, who can do nothing but pointing (as we have said,) is in the case at bar disastrous to the pointers and hard on the contractors. But this is not the first case where the

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exercise of the right of competition ends in such a result. The case at bar is an instance where the evils which are or may be incident to competition bear very harshly on those interested, but in spite of such evils competition is necessary to the welfare of the community.

So far as previous decisions go the case which comes nearest to the case at bar in the kind of question raised is that of *Allen* v. *Flood*, [1898] A. C. 1. In that case there was a dispute between shipwrights and boiler makers as to iron work in shipbuilding. It was stated by some of the judges (see for example Lord Watson at p. 99; Lord Herschell at p. 129; Lord Macnaghten at p. 151) that it was lawful for either to strike to get this work from the other. But the decision in *Allen* v. *Flood* went off on another ground. See Lord Halsbury, Ch. in *Quinn* v. *Leathem*, [1901] A. C. 495.

The defendants have urged upon us the case of *Bowen* v. *Matheson*, 14 Allen, 499. But although so far as the third cause of action here in question is concerned we have reached the result arrived at in that case, we have reached it on other grounds. That case went up on demurrer and the ground on which that case was decided was that on the allegations in the declaration it was to be treated as one of the class of cases of which *Parker* v. *Huntington*, 2 Gray, 124, is the leading case in this Commonwealth, and *Bilafsky* v. *Conveyancers Title Ins. Co.*, *ante*, 504, is the last, namely, cases in which the allegations of conspiracy are not allegations of a tortious act in and of themselves, but are simply allegations that the defendants joined in doing acts otherwise alleged to be tortious. It is not now material to inquire whether *Bowen* v. *Matheson* should or should not have been held to belong to this class of cases, for it is settled in this Commonwealth, as we have already said, that the line within which a combination of individuals like a labor union must confine its actions is drawn much closer than in case of the same individuals acting separately.

The plaintiffs have asked us to find on the evidence that the actions of the unions and of the business agents and other officers and of the members in compelling L. P. Soule and Son Company to discharge "the plaintiffs was due in part to a desire to further and protect their own interests, or what they conceived

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to be such, but more to a reckless and wanton, if not malicious, disregard of the rights of the plaintiffs and of others engaged in the business of pointing and to a determination to force them out of business and thereby deprive them of their accustomed means of earning a livelihood."

We find on the evidence that the plaintiffs have not made out the fact that the defendants' action was due to a reckless and wanton, if not malicious disregard of the rights of the plaintiffs and of others engaged in the business of pointing. Under these circumstances we do not find it necessary to decide what would have been the result had we found that fact. See in this connection Bowen, L. J. in *Mogul Steamship Co.* v. *McGregor*, 23 Q. B. D. 598, 615.

It follows that the third clause of the decree, which follows the third prayer of the bill, must be stricken out.

This brings us to the legality of the strike by the union bricklayers and masons employed by the L. P. Soule and Son Company on other buildings because that corporation was doing work on a building on which work was being done by pointers employed not by the L. P. Soule and Son Company but by the owners of the building.

That strike has an element in it like that in a sympathetic strike, in a boycott and in a blacklisting, namely: It is a refusal to work for A, with whom the strikers have no dispute, because A works for B, with whom the strikers have a dispute, for the purpose of forcing A to force B to yield to the strikers' demands. In the case at bar the strike on the L. P. Soule and Son Company was a strike on that contractor to force it to force the owner of the Ford Building to give the work of pointing to the defendant unions. That passes beyond a case of competition where the owner of the Ford Building is left to choose between the two competitors. Such a strike is in effect compelling the L. P. Soule and Son Company to join in a boycott on the owner of the Ford Building. It is a combination by the union to obtain a decision in their favor by forcing third persons who have no interest in the dispute to force the employer to decide the dispute in their (the defendant unions') favor. Such a strike is not a justifiable interference with the right of the plaintiffs to pursue their calling as they think best. In our opinion organ-

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ized labor's right of coercion and compulsion is limited to strikes against persons with whom the organization has a trade dispute; or to put it in another way, we are of opinion that a strike against A, with whom the strikers have no trade dispute, to compel A to force B to yield to the strikers' demands, is an unjustifiable interference with the right of A to pursue his calling as he thinks best. Only two cases to the contrary have come to our attention, namely: *Bohn Manuf. Co.* v. *Hollis*, 54 Minn. 223, and *Jeans Clothing Co.* v. *Watson*, 168 Mo. 133. The first of these two cases was overruled on this point in *Gray* v. *Building Trades Council*, 91 Minn. 171. The conclusion to which we have come is supported by *My Maryland Lodge* v. *Adt*, 100 Md. 238; *Gray* v. *Building Trades Council*, 91 Minn. 171; *Purington* v. *Hinchliff*, 219 Ill. 159; *Beck* v. *Railway Teamsters' Protective Union*, 118 Mich. 497; *Crump* v. *Commonwealth*, 84 Va. 927; *State* v. *Glidden*, 55 Conn. 46; *Purvis* v. *United Brotherhood of Carpenters*, 214 Penn. St. 348; *Gatzow* v. *Buening*, 106 Wis. 1; *Barr* v. *Essex Trades Council*, 8 Dick. 101; *Temperton* v. *Russell*, [1893] 1 Q. B. 715; Taft, J. in *Toledo, Ann Arbor & North Michigan Railway* v. *Pennsylvania Co.* 54 Fed. Rep. 730; *Loewe* v. *California State Federation of Labor*, 139 Fed. Rep. 71; *Hopkins* v. *Oxley Stave Co.* 83 Fed. Rep. 912; *Casey* v. *Cincinnati Typographical Union No. 3*, 45 Fed. Rep. 135.

It is settled in this Commonwealth by a long line of cases that a defendant is liable for an intentional and unjustifiable interference with the pursuit on the part of the plaintiff of his calling, whether it be of labor or business. *Walker* v. *Cronin*, 107 Mass. 555. *Carew* v. *Rutherford*, 106 Mass. 1. *Vegelahn* v. *Guntner*, 167 Mass. 92. *Plant* v. *Woods*, 176 Mass. 492. *Martell* v. *White*, 185 Mass. 255.

For the reason that the strike on the buildings being erected by the L. P. Soule and Son Company was not a strike in a trade dispute between the union and that corporation, the first and second clauses of the decree were in substance correct. Robert H. Pickett, however, is the only plaintiff who is shown to have had any interest in the work on the Ford Building, and therefore the second clause of the decree alone should stand.*

* The material part of the decree was as follows:

"That the respondents in said bill, to wit: The Bricklayers Benevolent and

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A few matters of detail remain to be dealt with.

All that the Bricklayers' Union No. 27 seems to have done was to adopt working rules making pointing a part of the trade of bricklaying. There is no evidence that they authorized the sending of the circular letter or took part in the strike. That union and the members of it should be stricken from the decree.

No objection has been taken to the decree in favor of Robert H. Pickett on the ground that damages would have given him adequate compensation for breach of his contract. For that reason it is not necessary to consider whether his proper remedy was an action at law for damages, as in *Carew* v. *Rutherford*, 106 Mass. 1, *Walker* v. *Cronin*, 107 Mass. 555, *Berry* v. *Donovan*, 188 Mass. 353, and *Quinn* v. *Leathem*, [1901] A. C. 495.

There is a point of practice which must be noticed. As we have said, the plaintiffs have undertaken to make three unincorporated labor unions parties defendant. That is an impossibility. There is no such entity known to the law as an unincorporated association, and consequently it cannot be made a party defendant. That was conceded in *Taff Vale Railway* v. *Amalgamated Society of Railway Servants*, [1901] A. C. 426. The point decided in that case was that the labor union defendant in that case could be sued because it was registered under Trades Union Acts 1871, c. 31, and 1876, c. 22. At law, if the objection is

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Protective Unions No. 3 and No. 27, The Stone Masons Benevolent and Protective Union No. 9, and each and every member thereof, Jeremiah J. Driscoll, Patrick J. Walsh, Michael J. Shea, J. Cronan, Dennis J. Sullivan, George K. Watson, John P. Burke, J. M. Ryan, Theodore Eldracher, Joseph W. Luke and George J. Twiss, and each of them, their servants, agents, confederates and attorneys, be and hereby are perpetually restrained and enjoined from combining and conspiring in any way to compel L. P. Soule and Son Company, or any other person, firm or corporation, by force, threats, intimidation or coercion, to discharge the complainants in the bill of complaint, to wit: Robert H. Pickett, Charles A. Pickett, Thomas J. Lally and Walter H. Wilkins, or to refrain from further employing them in and about their trade and occupation, and from combining and conspiring to compel the owners of the so-called Ford Building on Ashburton Place in the city of Boston to break or decline to carry out their said contract with the complainant Robert H. Pickett, and from combining and conspiring to interfere with, the said complainants, or any of them, in the practice of their trade and occupation, or to prevent them from obtaining further employment thereat."

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properly taken, every member of an unincorporated association must be joined as a party defendant. In equity, if the members are numerous, a number of members may be made parties defendant as representatives of the class. The practice in Massachusetts in suits against members of unincorporated labor unions generally has been in accordance with these well settled principles. See *Bowen* v. *Matheson*, 14 Allen, 499; *Carew* v. *Rutherford*, 106 Mass. 1; *Plant* v. *Woods*, 176 Mass. 492; *Martell* v. *White*, 185 Mass. 255. A trade union was made a party defendant in *Vegelahn* v. *Guntner*, 167 Mass. 92, and the anomaly seems to have escaped attention. The judge who entered the decree in the case at bar made it apply to the unions "and each and every member thereof." He seems to have treated the case as a case where a numerous body had been properly represented by defendants joined for that purpose. Possibly, so far as the trial of the case was concerned, the members of these two unions were in fact represented by the individual defendants. But there is nothing on the record which justifies a decree against "each and every member" of the three unions on the ground that the defendants were joined as representing the individual members of the unions constituting a numerous class of defendants. The three unions should be stricken from the bill as parties defendant, and proper allegations should be made to bind the members of the two unions as parties defendant. If the individual defendants were proper representatives of the members of the unions in question, and these members would suffer no damage from the bill being so amended now, that can be done. The cases are collected in *Fay* v. *Walsh*, 190 Mass. 374.

Upon the bill being so amended within sixty days the decree may be modified as hereinbefore set forth, and on being so modified, affirmed; otherwise the decree must be reversed.

So ordered.

F. W. Mansfield, for the defendants.

S. J. Elder & E. A. Whitman, for the plaintiffs.

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COMMONWEALTH *vs.* GEORGE L. PHELPS.

Berkshire. September 11, 1906. — October 16, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, & BRALEY, JJ.

Receiving Stolen Goods. Evidence. Practice, Criminal, Exceptions, Testimony of accomplice. *Accomplice. Witness.*

On the trial of an indictment for receiving and aiding in the concealment of stolen goods, although possession by the defendant out of the Commonwealth of goods stolen in the Commonwealth would not in itself warrant a conviction, evidence of such possession is competent in connection with other evidence to show that the defendant received the goods in this Commonwealth knowing them to have been stolen.

In a criminal as in a civil case no exception lies to a refusal to give a ruling if the substance of the ruling is contained in the judge's charge or if it has been given so far as it is material.

In a criminal trial in which the principal witness for the Commonwealth is an avowed accomplice of the defendant, there is no rule of law requiring the presiding judge to instruct the jury as to the weight to be given to the testimony of an accomplice.

INDICTMENT, found and returned in the county of Berkshire on January 8, 1906, charging, in the first count, that George L. Phelps of Williamstown on December 15, 1904, at North Adams bought, received and aided in the concealment of three thousand yards of cloth of the value of fifteen cents a yard, the property of the Arnold Print Works and stolen from that corporation, well knowing the property to have been stolen, in the second count, that on February 15, 1905, the defendant in like manner received three thousand yards of cloth, and, in the third count, that on May 29, 1905, the defendant in like manner received three thousand yards of cloth, in each case similarly owned and stolen and known to the defendant to have been stolen.

At the trial in the Superior Court before *Crosby*, J. it appeared that the stolen property consisted of about ten thousand yards of new "ladies' dress goods" worth about $2,000 manufactured by the Arnold Print Works at North Adams and stolen from the finishing room of that corporation by one Dooley, one of its

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employees, who at the time of the trial was under indictment for stealing the goods.

Dooley was the principal witness for the Commonwealth. He testified that he told the defendant that if he would take the goods away from North Adams and dispose of them he would give him half of the proceeds and that the defendant agreed to try it; that they took the goods in boxes to the house of the defendant and afterwards shipped them to Troy in the State of New York.

The defendant testified that he had known Dooley several years and had sold him farm produce, and always had found him and believed him to be an honest man; that in December, 1904, Dooley met him on the street and said "George, I want to see you. I have got some goods I bought at a bargain and want to dispose of"; that about a week later Dooley met the defendant and told him he bought those goods and that they were remnants, that he would like to have the defendant help sell them and wanted to make Williamstown headquarters, and said he would come over and show him about prices, and would give him half they made; that the defendant brought over to Dooley some apples and got three boxes of goods; that they were dry goods boxes and heavy; that afterwards Dooley came over to the defendant's house in Williamstown and they took the goods out of the boxes and marked them with tags, so that the witness would know what to sell them for; that these tags Dooley brought with him; that they measured the pieces of goods; that the defendant sold some of the goods at his house; that Dooley said they could sell the goods in Troy; that the defendant had nothing to do with shipping the goods to Troy and did not go to Troy with Dooley at the time the goods were shipped; that the name of A. L. Brooks was marked on the boxes by the defendant at the request of Dooley; that afterwards Dooley told the defendant that the sale had fallen through and that he wanted the defendant to go to Troy, and the defendant went to Troy with Dooley; that Dooley said that he wanted to hire a store and sort out some of the best goods, so they hired a store and moved the goods into the store and sorted out two boxes of the best goods and shipped them to New Jersey; that the defendant went to Albany and tried to sell the goods, but did not sell any; that

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the defendant afterwards shipped the goods to Chatham, and finally sold them at Waterbury, Connecticut, to one Curran at five cents a yard.

The defendant also testified, that Dooley told him that he had bought the goods from an assignee, that Dooley never told him that the goods were not "straight goods," and that he never knew the goods were stolen until he was arrested.

The course of the trial is described in the opinion, where the defendant's requests for rulings and the manner in which they were dealt with by the judge are stated.

The jury returned a verdict of guilty on each count; and the defendant alleged exceptions. The judge imposed a sentence on each count, but afterwards on motion of the defendant suspended the sentence until the questions of law involved should be determined by this court.

H. C. Joyner, for the defendant.

J. F. Noxon, District Attorney, for the Commonwealth, submitted a brief.

MORTON, J. This is an indictment in three counts for receiving and aiding in the concealment of stolen goods. There was a verdict against the defendant on all of the counts, and the case is here on exceptions by him to the refusal of the judge to instruct the jury as requested.

Taking the exceptions which have been argued in the order of the requests to which they relate, the first was to the refusal of the judge to instruct the jury as follows: "1. That if the jury find that the defendant Phelps did not know that the goods had been stolen until after they had been shipped to Troy, New York, then his connection with them, out of the Commonwealth, will not warrant a conviction on this indictment. 2. That if the defendant did not know and had no reasonable ground to suspect that the goods had been stolen until after they were shipped out of this State, and after that time had nothing more to do with the goods in this State, then the jury will not be justified in finding the defendant guilty." Taking the requests literally, it may well be doubted whether they raise the point which the defendant has argued, and whether in any aspect of the case they could have been properly given. Although possession out of the Commonwealth of goods stolen in the Commonwealth would not

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of itself warrant a conviction for receiving them and aiding in their concealment here, evidence of such possession would be competent against one accused of that offence. But assuming that the requests were intended to raise and did raise the question whether a guilty knowledge or belief first acquired outside of the State would warrant a conviction, we think that, if there was any evidence warranting such a contention, the matter was sufficiently covered by the charge. Phelps was a witness in his own behalf and admitted receiving the goods in Williamstown, but denied any guilty knowledge or felonious intent, and testified that he "never knew the goods were stolen until he was arrested." He did not contend or testify that he first acquired such knowledge outside of the State. There would seem, therefore, to have been no evidence warranting a contention that he first obtained knowledge that the goods were stolen outside the Commonwealth. But the judge instructed the jury as follows: "with reference to the knowledge or the belief of the defendant that these goods were stolen property, I instruct you that he would be guilty if when he received these various lots of goods he knew or believed that they had been stolen or if at any time thereafter and while he had these goods or any portion of these goods in the State of Massachusetts he knew or believed that the goods were stolen property." We think it plain that the jury must have understood that in order to convict they must find that the defendant had acquired a guilty knowledge or belief when the goods first came into his possession, which was in this State or while they were in his possession subsequently in this State. The instructions requested were, therefore, given in substance and that was all that was required.

The next exception was to the refusal of the judge to instruct the jury, as in substance requested, that, as bearing on the question whether the defendant honestly believed that the goods had not been stolen, the jury might consider what manner of man Dooley had been before his connection with the defendant, and what the defendant honestly believed as to his integrity, and that it was enough if the defendant dealt with Dooley in the same way that reasonable men would deal under like circumstances. The attention of the jury was not specifically directed to the matters thus referred to, but their attention was directed to the

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fact that the defendant testified that Dooley had told him that he had purchased the goods and that he, the defendant, understood they had been purchased by Dooley; and the jury were instructed that if he honestly believed that, if they found that Dooley did make such a statement to him and he acted in good faith supposing that statement to be true and acted in good faith throughout, he could not be convicted. In passing upon the defendant's good faith, the jury would necessarily have to take into account his conduct, and if they found that Dooley told him what the defendant testified that he did, then they would have to consider whether he was justified in believing what Dooley told him and the grounds for such a belief, amongst which would naturally be his knowledge and belief in regard to Dooley's standing and honesty. If they did not believe that Dooley told the defendant what he testified that he did, and if they believed Dooley as to the circumstances under which the goods came into the defendant's possession, then of course any question as to the defendant's belief in Dooley's integrity became entirely immaterial. The instructions given were, therefore, sufficient and the defendant was not harmed by the refusal to give those which were requested.

The last exception was to the refusal to instruct the jury as to the suspicious character of the testimony of an accomplice, and to advise them that such testimony should be carefully considered, and was unsafe to convict upon unless corroborated. The instruction thus requested related to Dooley's testimony. General instructions in regard to the credibility of the witnesses were given, and, whatever the practice may be, it is enough to say of the instruction thus requested that there is no rule of law requiring the judge to instruct a jury as to the weight to be given to the testimony of an accomplice. *Commonwealth* v. *Bishop*, 165 Mass. 148. *Commonwealth* v. *Clune*, 162 Mass. 206.

Exceptions overruled.

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MARY J. COONEY *vs.* VALMORE A. WHITAKER, administrator with the will annexed.

Berkshire. September 11, 1906. — October 16, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, & BRALEY, JJ.

Devise and Legacy. Marshalling of Assets.

A testator after making a specific devise of certain real estate to two of his children devised all the remainder of his real estate to three other of his children "to be divided equally between them in three equal shares." On a petition to marshal the assets of the testator's estate, it was *held*, that the last named devise was general and not specific, and that the real estate covered by it must be applied to the payment of debts before resorting to the real estate specifically devised.

APPEAL from a decree of the Probate Court for the county of Berkshire, marshalling the assets of the estate of Jeremiah Broderick, deceased testate, for the payment of the debts of his estate.

The will of Jeremiah Broderick was dated May 14, 1897, and, omitting the introductory and the attesting clauses and the signatures, was as follows:

"After the payment of my just debts and funeral charges, I bequeath and devise as follows:

"1st. To my son Robert William Broderick and my daughter Mary Cooney, wife of Patrick Cooney, all my personal property of every name and nature in equal shares, share and share alike, as well as equal shares in my Home Lot, where I now live, my dwelling house, barns and land situated on the south side of East Main Street, in said North Adams, and is bounded on the north by said East Main Street, on the east by East Union Street, and lands of Flaherty, Hatton and Davis, on the south by lands of Davis and on the west by lands of Roach, and is said to contain nine acres of land be the same more or less.

"And in case my said son Robert William Broderick dies before he comes of age, his one-half part is to be the property of my said daughter Mary Cooney, and if my said daughter Mary Cooney should die before my said son Robert William Broderick becomes of age, then he the said Robert William Broderick is to have my said daughter Mary Cooney's share as

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well as his own, and it is my will that neither my said son Robert William Broderick nor my said daughter Mary Cooney, shall sell or mortgage any portion of the above described real estate, during their lives without the consent of the other party, both if alive must be satisfied to sell or mortgage.

"2d. To my son Jeremiah M. Broderick, the east corner building lot, east of my son James Broderick's land.

"3d. To my three sons Jeremiah M. Broderick, James Broderick and P. H. Broderick, all the remainder of my real estate, to be divided equally between them, in three equal shares.

"4th. I give to my daughter Margaret Sheehan, the sum of Five Dollars, as I have provided for her already.

"5th. I nominate and appoint Edward C. Kiely to be the executor of this my last will."

In the Probate Court *Slocum*, J. made a decree that the property and assets of the estate be marshalled and used for the payment of debts in the following order:

1. All personal estate of the deceased, not specifically devised, to be first used and exhausted.

2. The real estate of the deceased devised under the third clause of his will, the same being a residuary clause, to be next exhausted.

3. All the remaining devises, being specific, must contribute to the payments in the proportion that the cash value of each bears to the amount to be paid.

On appeal the case was heard by *Morton*, J., who found the following facts:

Jeremiah Broderick lived in North Adams for about thirty years and down to the time of his death lived on a certain place which he called his "Home Place," and which is described in his will as the "Home Lot." He lived with the petitioner, who was his oldest daughter and was married. At the time of the testator's death, the family, besides the petitioner and her father, consisted of the petitioner's husband, her two young children, and her youngest brother, named Robert, who was a boy sixteen years of age. The testator had three older sons who were grown men, having families of their own, and lived elsewhere in North Adams, and one other daughter, a married woman, who also lived in North Adams.

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The testator died on October 7, 1897, and his will was proved and allowed. His wife had died before him. The executor named in the will declined to serve, and Valmore A. Whitaker of North Adams was appointed administrator with the will annexed.

After the death of her father the petitioner paid the expenses of his last sickness, his burial expenses, expenses in connection with the burial lot and other debts of the deceased. The administrator refused to repay her, and she brought an action against the estate in the Superior Court. The case was referred to an auditor who reported that there was due to her the sum of $950. The case in the Superior Court is still pending, awaiting funds in the hands of the administrator with which to pay the amount found due. The administrator, representing that he had not sufficient personal estate in his hands with which to satisfy the petitioner's claim, petitioned the Probate Court for leave to sell "Home Place" to raise such funds.

The petitioner then filed the present petition to marshal the assets, and action on the petition to sell real estate was stayed by injunction until it should be determined by the decision in the present proceeding what estate should be applied to make such payment.

So far as appeared the testator had sold and disposed of none of his real estate between the time that he made his will and the date of his death, and had bought none.

The petitioner contended that the devise to her and her brother Robert under the first clause of the will was specific; that the devise under the third clause of the will was general and residuary; that the real estate devised under the third clause must be exhausted before any portion of the real estate devised under the first clause of the will could be taken for the payment of the debts of the testator; and that the decree of the Probate Court should be affirmed.

The respondent contended that all the devises in the will were specific, and that all should contribute in proportion to their fair market value to the payment of the debts of the estate.

With the consent of the parties the justice reported the case for determination by the full court, such decree to be entered as law and justice might require.

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H. C. Joyner, for the petitioner.

C. J. Parkhurst, for the respondent.

KNOWLTON, C. J. The questions of law presented on this record are very simple. No doubt is suggested as to the jurisdiction of the court to entertain a petition of this kind and make a decree which shall marshal the assets for the proper settlement of the estate. R. L. c. 162, §§ 2, 3, 5. *Lee, appellant*, 18 Pick. 285, 289.

There is no dispute that the devise of real estate to the petitioner and her brother, in the first clause of the will, is specific. It is equally clear and undisputed that specific devises and legacies are not to be taken for the payment of a testator's debts until the general legacies and devises are exhausted. R. L. c. 135, §§ 26, 27. *Blaney* v. *Blaney*, 1 Cush. 107, 115. *Farnum* v. *Bascom*, 122 Mass. 282, 286. The only contention of the appellants as a ground for reversing the decree of the Probate Court is that the devise of real estate to them, in the third clause of the will, is also specific. The language of this clause is as follows: "To my three sons, Jeremiah M. Broderick, James Broderick and P. H. Broderick, all the remainder of my real estate, to be divided equally between them, in three equal shares."

The English rule that all devises of real estate are to be regarded as specific is not in force in this State. *Blaney* v. *Blaney*, 1 Cush. 107, 116. *Farnum* v. *Bascom*, 122 Mass. 282, 286. Under the R. L. c. 135, § 23, land acquired by a testator after the making of his will may pass by the will, as well as that owned by him at the time of making it. The devise in question in this case included all the real estate that the testator might own at the time of his death, except that specifically devised in the preceding clauses of the will. The clause contains no reference to any particular land. We think it plain that the devise is general, and not specific.

It follows that the land covered by it is to be applied to the payment of debts before resort is had to the real estate specifically devised, and that the decree of the Probate Court should be affirmed.

Decree accordingly.

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MARTHA I. BABBITT & another *vs.* JOHN M. SHEARER.

Franklin. September 18, 1906. — October 16, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Practice, Civil, Costs.

In an action of tort in the nature of trespass *quare clausum fregit,* where no right to an easement or a title to land is drawn in question, if the plaintiff obtains a verdict for more than $20 and afterwards by requirement of the presiding judge as an alternative to the setting aside of the verdict as excessive remits all of the damages in excess of $20, under R. L. c. 203, § 5, he can recover no costs.

In an action for a trespass to land, if the trespass was casual and involuntary and the defendant tenders the damages, disclaims title and makes a payment into court in accordance with the requirements of R. L. c. 185, § 8, and if a verdict for more than the amount tendered is reduced by the plaintiff's voluntary act to less than the amount tendered, *semble* that the defendant is entitled to recover his costs.

KNOWLTON, C. J. This is an appeal from a taxation of costs in favor of the surviving plaintiff. The action was tort for trespass *quare clausum fregit,* and the jury returned a verdict for damages in the sum of $37.50. This, on the defendant's motion to set it aside as excessive, was ordered to be set aside, and a new trial was to be granted unless the surviving plaintiff should remit all in excess of $20. Thereupon she filed a paper remitting all the damages above $20, and judgment was ordered in her favor. Costs for the plaintiff were taxed by the clerk in the sum of $93.33, and, upon appeal by the defendant, this taxation was affirmed by a judge of the Superior Court.

The plaintiff's action in remitting all of the damages in excess of $20 had the same effect as if the verdict had been originally returned for that sum. This, then, is a personal action commenced in the Superior Court, in which the plaintiff does not recover final judgment for more than $20 for debt or damages, and in which there is no certificate by the justice before whom the action was tried that the right to an easement or the title to land was drawn in question, and in which no such right or title was in fact drawn in question; for the defendant in his answer admitted the title of the plaintiffs. It comes within the language

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of R. L. c. 203, § 5, which provides that a plaintiff shall recover no costs in such an action.

The R. L. c. 174, § 12, in regard to tender, has no application to this case, as it relates only to liabilities on contracts.

The defendant averred in his answer that, before the above action was commenced, he made a tender of $30 under the R. L. c. 185, § 8, which provides for such a tender by a trespasser if the trespass was casual and involuntary. To make such a tender effectual, if it is not accepted, the defendant must bring the money into court, disclaim title, and allege the tender, and that the trespass was casual and involuntary. If it is found on the trial that the allegations are true, and if the damages assessed are not more than the amount tendered, the defendant recovers his costs. In this case, if tender was made, it was not accepted, and the record shows nothing about it except the defendant's averment of the fact that the money was brought into court. So far as appears, the case was tried without reference to this defence, and there is nothing to indicate that the trespass was involuntary. The defendant's averment in his answer is of no effect except to present the issue. We cannot assume that this is a case to which this statute applies. The plaintiff's brief and argument, as well as the record, indicate that at no time has she treated the case as coming under this statute. We must deal with it as if no averment of tender had been made and no money had been brought into court.

If it were otherwise, and the tender had been authorized by the law and the facts, the final assessment of damages, by the plaintiff's voluntary act, at less than the amount tendered, would entitle the defendant to a judgment for costs.

Under the statute first cited the order of taxation is reversed, and the plaintiff will take no costs.

So ordered.

W. A. Davenport, for the defendant.

A. P. Carpenter, for the plaintiff.

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ABSENTEE.

In proving a debt against an absentee under R. L. c. 144, § 9, to be paid out of the proceeds of his property in the hands of a receiver appointed under that chapter, a proper general notice to the receiver and to persons within the jurisdiction interested in the estate is sufficient without personal notice to the absentee, which in most cases to which the statute applies would be practically impossible. *Purdon* v. *Blinn*, 387.

Decree for alimony in gross sum is debt which may be proved against absentee within meaning of R. L. c. 144, § 9, and ordered paid out of proceeds of his property, see MARRIAGE AND DIVORCE, 2.

ADMINISTRATOR.

See EXECUTOR AND ADMINISTRATOR.

ADVERSE POSSESSION OR USE.

1. One proving a title by adverse possession may include the possession of his predecessor in title which has been transferred to him. *Luce* v. *Parsons*, 8.

2. On the issue, whether the possession of one who claimed certain land under a deed and that of his predecessor in title were adverse, it is competent for the person making such claim to show that he paid $9,000 for the land, that his predecessor in title and possession brought an action for trespass against a street railway company for constructing its railway over a part of the land, and that this same predecessor built a cottage upon the land which cost him about $1,200. *Ibid.*

In proving title by adverse possession one may show declarations of deceased predecessor in title as to his occupation of the land and declarations by him as to boundaries, but not opinions of conveyancer on questions of law or incompetent questions of fact, see EVIDENCE, 2, 5.

Use of pond for cutting of ice between nineteen and twenty years by son of owner of land under pond by oral permission of his father, coupled with fact that for year before that period son worked by odd jobs on the land does not show exclusive occupation nor use of land for cutting and taking ice by son for twenty years, see EASEMENT, 1, 2.

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AGENCY.

Scope of Authority.

1. Where a power of attorney gives to two persons named a bare authority to receive money from a fund to be distributed, they not being partners in business and having no interest in the fund, neither of them alone has authority to receive the money without the consent of the other. *Robbins* v. *Horgan*, 443.
2. A power of attorney from the next of kin in a foreign country of one who died in this Commonwealth authorizing the payment of their shares of the estate of the deceased to two persons named as attorneys, one being a resident in this Commonwealth and the other a United States consul in the foreign country, does not give authority to the attorney in this Commonwealth to receive payments without the consent of his co-attorney; and if the administrator of the estate of the deceased pays the amounts of the shares of the principals to the attorney in this country without the knowledge or consent of his co-attorney in the foreign country, and the attorney to whom the payments are made absconds with the money, such payments will be disallowed in the accounts of the administrator and he will be held liable to the principals to make good their loss. If the attorney to whom the money was paid appeared in behalf of the principals to consent to the appointment of the administrator this does not increase his authority to receive the money. *Ibid.*
3. Whether the placing of an overdue negotiable promissory note indorsed in blank in the hands of an attorney with directions to collect it but with no further instructions gives the attorney authority, in the absence of facts showing such a course to be necessary or advisable, to transfer the note to a third person having no interest therein in order that an action upon the note may be brought in the name of that person, here was not considered, an exception raising this point having been treated as waived because not argued. *Jump* v. *Leon*, 511.

Undisclosed Principal.

4. An agent may sue on an agreement in writing made by him in his own name in behalf of an undisclosed principal. *Buffington* v. *McNally*, 198.
5. If an agent suing on a contract made by him in his own name in behalf of an undisclosed principal describes himself in his writ as agent, this designation does not affect his right to recover in his own name or make admissible evidence offered by the defendant to show that the contract was that of the undisclosed principal. *Ibid.*

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Unauthorized Act of Servant of Corporation.

Waiver or abandonment of rule of street railway company not shown by acts of conductor or motorman, see NEGLIGENCE, 28, 29.

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Fact that conductor of railroad train accepts from person on train ticket procured by fraud, knowing it to have been so procured, does not give that person rights of passenger as against corporation operating train, see CARRIER, 1, 2.

Ratification of Act of Agent.

6. The owner of a house employed a real estate broker to sell it for him but instructed him not to advertise it. The broker forgot the instruction and in good faith advertised the house for sale. Solely as a result of the advertisement a person who had read it went to the owner, informed him that he had seen the advertisement and offered to buy the house, which the owner thereupon sold to him. In an action by the broker for a commission on the sale, it was *held*, that the owner by accepting the customer and selling him the house ratified the act of the broker in advertising the house for sale and was liable for the commission. *Maloon* v. *Barrett*, 552.

Revocation of Agent's Authority.

7. Discussion by LORING, J. of the question at what point negotiations conducted by a real estate broker employed by a landowner have progressed so far that a revocation of the broker's authority would be in fraud of his rights. *Cadigan* v. *Crabtree*, 233.

8. In an action by a real estate broker for a commission for procuring a tenant for a certain building of the defendant, the plaintiff testified that he received an offer to take a lease of the property on certain terms and went to see the defendant and reported the terms to her, that she said she would not do anything about it just then, that she was going away, but that she should like to sell the property for a price which she named, and said, "You see if you can get me a customer," whereupon the plaintiff said "If you change your mind about renting it, let me know." The defendant denied that any offer to take a lease was communicated to her, and testified that she wrote to her agent to "take the sign down," as she had made up her mind to sell the property, and told the plaintiff at once that she would do nothing with her property, and that she was disgusted with the whole business and was tired out and was going off to rest in New York. Later the defendant leased the property to the tenant from whom the plaintiff testified that he procured the offer on terms which the plaintiff contended were in substance those procured by him. The presiding justice refused to instruct the jury that the plaintiff's authority to procure a tenant for the defendant's property was terminated or revoked at this interview between the plaintiff and the defendant before the lease was made. *Held*, that, apart from the question whether the revocation of authority was in good faith, the instruction that there was a revocation in fact should have been given. *Ibid.*

Commission.

Commission paid by trustee to broker for negotiating sale of real estate belonging to trust should be charged to income and not to capital, see TRUST, 10.

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Action by real estate broker for commission for renting certain building depending on whether agent's authority to procure tenant was revoked before he procured such tenant, see *ante*, 7, 8.

Right of broker to commission on sale of real estate where customer was introduced to owner through advertisement inserted in good faith by broker contrary to owner's instructions, owner in dealing with customer knowing that he came because of advertisement, see *ante*, 6.

ALIENATION OF AFFECTIONS.

In action for alienation of affections, evidence of experiments to test testimony of plaintiff's witness who related things heard through partition of building held rightly excluded in discretion of judge presiding at trial, and evidence as to matters observed by various witnesses held rightly admitted in connection with other testimony, see EVIDENCE, 6, 7, 10, 11.

ALTERATION OF INSTRUMENTS.

If an unexecuted lease of real estate bearing upon it a guaranty of the performance of the covenants of the lease purporting to be under seal but with no seals affixed is executed by the guarantors and by the lessee, and thereafter one having no authority to do so affixes seals to the signatures of the guarantors and sends the lease to the lessor, who executes it with no knowledge of the alteration and delivers it to the lessee who occupies the premises under the lease, the lessor can sue the guarantors upon their contract of guaranty as if no seals had been placed opposite their names. *Tulane University* v. *O'Connor*, 428.

ANTI-TRUST LAW.

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From findings of Land Court, see LAND COURT, 2.

In suits in equity, see EQUITY PLEADING AND PRACTICE, 7, 14, 15, 18–21.

ARBITRAMENT AND AWARD.

1. An attempted submission to arbitration under R. L. c. 194, which provides that the arbitrators shall hear the parties only in case they consider hearings necessary, is void for want of compliance with the statute. *Nay* v. *Boston & Worcester Street Railway*, 517.

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2. An attempted submission to arbitration under R. L. c. 194, which provides that if two physicians named as arbitrators are unable to agree as to the damages caused by certain personal injuries they shall call in as a third arbitrator some reputable physician on whom they agree and that the award of a majority of the three arbitrators shall be final, is void for want of compliance with the statute. *Nay* v. *Boston & Worcester Street Railway*, 517.
3. Where two several causes of action of a wife and her husband against the same corporation and arising from the same injuries are submitted to arbitration by an agreement under R. L. c. 194, an award of a round sum to the wife and her husband jointly is void. *Ibid.*

ASSESSMENT.

See TAX, 1-7.

ASSIGNMENT.

If a corporation which prints and sells tickets used by transportation companies makes a valid contract in writing with a corporation manufacturing an improved printing perfecting press by which the manufacturing corporation sells it a press and agrees not to sell this type of press to other customers to be used by them for a similar purpose, the contract containing no provision for its assignment, and later in a reorganization the printing corporation conveys and assigns all its corporate property including choses in action to a new corporation, the manufacturing corporation not assenting to the assignment, the assignment passes to the new corporation any right of action against the manufacturing corporation for a breach of its agreement which occurred before the assignment, but does not assign the contract. *New York Bank Note Co.* v. *Kidder Press Manuf. Co.* 391.

ATTORNEY AT LAW.

Whether placing of overdue promissory note indorsed in blank in hands of attorney to be collected with no further instructions gives attorney authority, in absence of facts showing such course necessary or advisable, to transfer note to third person having no interest therein for purpose of bringing action in his name, see AGENCY, 3.

ATTORNEY GENERAL.

Whether attorney general as representing public has right of appeal from decree of Land Court deciding that public has no right of way over land of petitioner for registration adjoining highway of city, *quaere*, see LAND COURT, 2.

BETTERMENT.

See TAX, 2-7; BOSTON, 1, 2.

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BILLS AND NOTES.

Presentment and Demand.

1. In this Commonwealth the rule, that the holder of a promissory note which is payable at a particular time and place can maintain an action on the note against the maker without showing a demand or presentment at the place named, applies also to a note which is payable at a particular place on demand, and the presentation of such a note and a personal demand on the maker in a State other than that in which the place named for payment is situated are sufficient, if any demand is necessary before suing on the note. *Farmers National Bank of Annapolis* v. *Venner*, 531.
2. In an action on a promissory note payable on demand against the maker, it appeared that the note was dated and apparently was made in the city and State of New York, that it was given in renewal of a note held by a firm doing business at Baltimore in the State of Maryland, was delivered to the plaintiff, a bank organized under the laws of the United States and doing business at Annapolis in the State of Maryland, at its usual place of business in Annapolis, and was made payable at the office of the firm doing business in Baltimore. There was evidence that the note was presented personally to the defendant and that a demand was made upon him for its payment in the city of New York. There was no evidence of a presentation or demand at the office of the firm in Baltimore which was named as the place of payment. There was evidence that by the law of the State of Maryland a demand at the office of the firm in Baltimore was not necessary to enable the plaintiff to maintain its action. No evidence was introduced as to the law of the State of New York. *Held*, that the contract was governed by the law of Maryland or the law of New York; that in the absence of evidence as to the law of New York it was presumed to be the same as the common law of this Commonwealth; and that in either case no demand at the place named for payment was necessary. *Ibid.*

Extinguishment.

3. The surrender of a genuine note of a town in exchange for an instrument purporting to be a renewal note forged by the treasurer of the town does not extinguish the surrendered note, which, although not to be found, still can be sued upon by the holder thus induced to give it up. *Bass* v. *Wellesley*, 526.
4. If the holder of a genuine note of a town surrenders it in exchange for an instrument purporting to be a renewal note which has been forged by the treasurer of the town by raising it from $5,000 to $15,000, and the holder is acting under a mistake in supposing that the treasurer has authority to renew the note as well as in believing the renewal note to be genuine, his mistake of law as to the authority of the treasurer does not prevent him, when suing later on the surrendered note, from showing that the instrument accepted in renewal was a forgery and therefore that the note surrendered by him was not extinguished. *Ibid.*

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Genuineness.

5. In an action against a town on two promissory notes purporting to be signed in approval by the selectmen of the defendant, which were negotiated fraudulently by a defaulting treasurer of the town who then was in good standing and which came into the hands of the plaintiff as a *bona fide* purchaser, where the defence was that the signatures of the selectmen were forged by the treasurer, it appeared that meetings of the selectmen were held regularly on a certain evening of every week and that notes usually were signed at such meetings, that notes usually were signed two or three days before their dates, that the notes sued upon bore date four days after a meeting at which two notes for the same amounts as the notes sued upon had been signed by the selectmen, that the notes sued upon were sold by the treasurer on the day before the next meeting of the selectmen, that these notes did not appear in the list of genuine notes of the town nor in the treasurer's accounts and were not to be found, the plaintiff having parted with them in exchange for a renewal note forged by the treasurer. There was nothing to show that at the meeting last preceding the date of the notes the selectmen signed more than two notes or that more than two notes were signed by them between that meeting and the next one. *Held*, that there was evidence warranting a finding that the two notes signed by the selectmen at the meeting four days before the date of the notes sued upon were the two notes purchased by the plaintiff. *Bass* v. *Wellesley*, 526.

Burden is on *bona fide* purchaser of promissory notes of town, in action against the town where defence is that notes are forgeries, to show genuineness of notes by fair preponderance of evidence, but he is not required to exclude possibility of forgery, see EVIDENCE, 9.

Pledgee of Note.

Holder of negotiable promissory note secured by collateral may pledge it with its collateral to secure his own note, and pledgee thereby becomes holder of pledged note with right to collect it either by action or sale of collateral or both, see PLEDGE, 1.

Holder with no Beneficial Interest.

Holder of negotiable promissory note indorsed in blank may maintain action thereon against maker although he has no beneficial interest therein, if he has assent of beneficial owner; but maker may have set-off of claim against beneficial owner as equitable defence under R. L. c. 174, § 5, see PRACTICE, CIVIL, 1, 11, 12.

Set-off against Maker.

Promissory note purchased by defendant after action was begun cannot be set up as defence at law under R. L. c. 174, § 1, see PRACTICE, CIVIL, 10.

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BOARD OF HEALTH.

Municipal.

1. The general statute R. L. c. 102, § 69, requiring in cities of a certain population a license from the board of health before a stable can be erected, must be held to be subordinate to the special statute St. 1893, c. 407, § 4, which authorizes the metropolitan park commissioners to "do all acts needful for the proper execution of the powers and duties granted to and imposed upon" them as agents of the Commonwealth. *Teasdale* v. *Newell & Snowling Construction Co.* 440.
2. R. L. c. 102, § 69, providing that "no person shall erect, occupy or use for a stable any building in a city whose population exceeds twenty-five thousand unless such use is licensed by the board of health of said city" does not apply to a stable placed temporarily on land taken for a reservation by the metropolitan park commissioners for the use of a contractor employed by the commissioners in the preparation of the land for a park, which is reasonably necessary for the prosecution of that work and was erected under a vote of the commissioners and by their sanction. *Ibid.*
3. The board of health of a city which had no hospital for contagious diseases, finding a case of smallpox in the family of one of the tenants of a certain house belonging to a woman, quarantined the building and occupied it for a smallpox hospital, treating forty or more cases there. The board of health caused no warrant to issue under Pub. Sts. c. 80, § 43, which then was in force, to take the building as a hospital, but the owner of the house executed a lease to them for a certain period for a monthly rent named therein which it was stipulated should continue for such further time as the lessees should hold the premises. After the expiration of the term of the lease the monthly rent was increased in amount, the occupation as a hospital continued and the owner of the house continued to receive the rent. Later she brought an action of tort against the members of the board of health for damages for alleged unlawful occupation of her premises. In this action she offered to show that in executing the lease she did not believe or realize that she was signing away any rights to recover damages and that since the occupation by the defendants her house had been commonly known as "the pest house." The evidence was excluded, and a verdict was ordered for the defendants. *Held*, that the lease and the continued receipt of rent by the plaintiff after its expiration operated as a consent to the occupancy of the house by the defendants for a smallpox hospital and rendered any action by them under the statute unnecessary; that the evidence offered by the plaintiff properly was excluded as incompetent and immaterial; and that the verdict for the defendants was ordered rightly. *Sallinger* v. *Smith*, 317.

BOSTON.

Street Commissioners.

1. Except under St. 1902, c. 503, the street commissioners of the city of Boston cannot make an executory agreement on behalf of the city not to

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assess betterments for the laying out of a street, although their official action followed by the action of the authorities authorized to construct a street may constitute an acceptance of an offer made by landowners to induce the laying out of a street. *Whitcomb* v. *Boston*, 211.

2. In an action against the city of Boston to recover a sum of money which the plaintiff had been compelled to pay as a betterment assessment upon his land on account of the laying out and construction of a certain street, it appeared that the plaintiff and others executed a deed to the city purporting to be a conveyance of land in fee simple and containing a condition or an agreement that the city should assume any betterments assessed upon the plaintiff's land on account of the laying out and construction of the street in question and would save the plaintiff harmless therefrom, that more than a year after its date this deed was taken to the office of the street commissioners and there put in a pigeon hole in which such papers that had not been acted upon or accepted were kept together, that at the time the deed was brought to the office it was not the practice of the street commissioners to accept such papers although it had been their practice to do so at the time the deed was dated, that there was no reference to the deed in any record of the street commissioners or of any board or department of the city, that the deed never was taken by the officer who had the custody of valuable papers belonging to the city, and never was recorded. *Held*, that there was no evidence to warrant a finding that the deed ever was accepted by the city. *Ibid.*

St. 1900, c. 296, § 1, authorizing street commissioners of Boston to lay out, widen and order construction of highway from Malden Bridge to boundary line between Boston and Everett, and providing that "no assessment shall be made" therefor, repealed as to this improvement the law giving power to street commissioners to assess for benefits, see TAX, 3.

Veto by Mayor.

3. Under the provision of the charter of the city of Boston, St. 1854, c. 448, § 47, requiring that an ordinance, order, resolution or vote passed by the board of aldermen and the common council "shall be presented to the mayor," and if not "returned by the mayor within ten days after it shall have been presented, the same shall be in force," leaving a vote with a clerk in the mayor's office in the absence of the mayor is not a presentation to the mayor within the meaning of the charter. *Farwell* v. *Boston*, 15.

4. The charter of the city of Boston, St. 1854, c. 448, § 47, provides that an ordinance, order, resolution or vote passed by the board of aldermen and the common council "shall be presented to the mayor," and if it "shall not be returned by the mayor within ten days after it shall have been presented, the same shall be in force." A vote accepting a certain act of the Legislature was passed by the board of aldermen and the common council of that city and on Friday, July 3, of the year in question a certified copy of the vote was delivered to a clerk in the office of the mayor who indorsed upon it a statement that it was received on that day. The mayor was not in his office and did not see the act and the vote until Monday, July 6.

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On July 14, the mayor returned the vote to the board of aldermen, in which it originated, with a message purporting to be a veto of the vote. A committee of the board of aldermen reported that "this veto was not returned to the board within the time required by law" and this report was accepted. *Held*, that the veto of the mayor was made in due season, the vote not having been presented to him until July 6. *Farwell* v. *Boston*, 15.

BOSTON ELEVATED RAILWAY COMPANY.

Duty of Boston Elevated Railway Company as to applying to railroad commissioners for approval of method of preventing sparks of metal from contact shoes on electric trains operated on elevated structure from falling upon and injuring travellers on street below, see NEGLIGENCE, 44.

Questions concerning liability for injuries so caused, see NEGLIGENCE, 41–45.

BOUNDARY.

Determination of boundary of highway on petition of owner of private land abutting thereon, and rights of public in such proceeding, see LAND COURT, 1, 2.

Petitioner in Land Court seeking to establish adverse possession may introduce in evidence statements of deceased predecessor in title made on land in pointing out boundaries claimed by him, see EVIDENCE, 5.

BROKER.

Broker's right to commission, see AGENCY, 6–8.

Commission paid by trustee to broker for negotiating sale of real estate belonging to trust should be charged to income and not to capital, see TRUST, 10.

CAPITAL AND INCOME.

Where estate nearly one third of which is realty is held in trust with large discretionary powers in trustee, payments for extensive alterations of real estate deemed necessary to make whole estate productive may be charged to income, as well as payments necessary for carrying unproductive real estate, where testator has favored permanent real estate investments and has recommended that trustee sell no real estate without careful consideration; likewise as to payment of commission for effecting sale of real estate; proceeds of sale of unproductive real estate beyond inventoried value go to capital and not to income, see TRUST, 10–12.

CARRIER.

1. If the conductor of a train of a railroad company knows that a person in the train is travelling on a ticket procured by fraud, he has no power by accepting the ticket to give the person travelling on it the rights of a passenger. *Fitzmaurice* v. *New York, New Haven, & Hartford Railroad*, 159.

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2. If a girl over eighteen years of age who is not a student travels over a railroad on a season ticket fraudulently procured by her, which is intended by the railroad company to be issued at half price only to students under eighteen years of age, she has not the rights of a passenger and her position is not improved by the fact that the conductors on the trains of the railroad company have accepted the coupons of her ticket, whether they knew of her fraud or not. *Fitzmaurice* v. *New York, New Haven, & Hartford Railroad*, 159.

Trespasser has no rights as passenger, see NEGLIGENCE, 46.

Street railway company is not under duty to exercise toward traveller using highway, not a passenger, same degree of care required toward passenger, but only such care as is required of ordinarily prudent and careful man under circumstances, see NEGLIGENCE, 32, 33.

CITIES AND TOWNS.

See MUNICIPAL CORPORATIONS.

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Right of veteran under R. L. c. 19, §§ 23, 24, to preference for continuous service, and construction of rules of civil service commissioners with regard thereto, see VETERAN, 1–6.

CLOUD ON TITLE.

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Deed of water company to town delivered and recorded in accordance with illegal vote of town meeting is cloud on title which town by suit in equity may have removed when it legally has procured right to conveyance by agreement under statute subsequent to deed, see MUNICIPAL CORPORATIONS, 4.

CONFLICT OF LAWS.

Promissory note dated and apparently made in New York, given in renewal of note held by firm doing business in Maryland, delivered in Maryland to a national bank doing business in Maryland and payable there, in absence of evidence of law of New York, is governed by law as to presentment and demand as it is in Maryland and this Commonwealth, see BILLS AND NOTES, 2.

CONSPIRACY.

1. What is lawful for an individual may be unlawful when done by a combination of individuals. *Pickett* v. *Walsh*, 572.

2. In an action of tort alleging a conspiracy, if the gist of the action is not the conspiracy but a tort which it is alleged that the defendants committed

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jointly, the acts alleged to have been done by the conspirators are not actionable unless they would have been actionable had they been done by the defendants severally. *Bilafsky* v. *Conveyancers Title Ins. Co.* 504.

3. Where the selectmen of a town called a town meeting to act on a proposition to purchase the plant of a water company at a certain price and before the meeting but after they had issued the warrant for the meeting voted to purchase the plant at the price named, but they had not stated in the warrant for the meeting their intended vote to purchase the plant and did not disclose their vote to the community before the meeting, this failure to give the information, although it may have been ill advised and an error of judgment, is not evidence of corruption to support a charge of conspiracy unless there is proof to connect it with fraudulent conduct or an unlawful purpose. *Revere Water Co.* v. *Winthrop*, 455.

Questions arising in suit in equity by pointers to enjoin strike by members of bricklayers' and of stone masons' unions in refusing to work for contractors who employed plaintiffs, sought to be maintained on grounds of alleged conspiracy and unlawful interference with contract rights, see LABOR UNIONS, 1-6.

CONSTITUTIONAL LAW.

Attempted Exercise by Legislature of Judicial Power.

Where on a petition for damages under a special act providing for the abolition of a certain grade crossing this court has decided that the petitioner, a part of whose land was taken, is not entitled to damages for injury to his remaining land caused by the removal of the railroad, and a judgment has been entered on his petition in accordance with this decision, whether an act of the Legislature which was passed after the entry of such judgment giving damages for property injured by reason of the removal of the railroad in the abolition of the grade crossing in question, if it became operative, would be constitutional as applicable to the parties to this petition, *quaere*. *Farwell* v. *Boston*, 15.

Obligation of Contract.

Legislature may at any time suspend or repeal law giving power to levy betterment assessments except so far as obligations of contract are involved, see TAX, 2.

Appropriation of Property without due Process of Law.

St. 1905, c. 477, giving Revere Water Company right upon notice, after acceptance of act by town of Winthrop, to sell to that town its plant therein at fair valuation, authorizing such purchase by town and providing that town in such case shall not construct system of its own unless it first purchases company's plant, but that, if company does not elect to sell, town may construct system of its own, is not appropriation of private property for public use without due process of law and hence not void, under

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fourteenth amendment of Constitution of United States, see REVERE WATER COMPANY, 2.

CONTRACT.

What constitutes.

Agreement to hire hall on Saturday nights during "season" accepted by acts of person authorized to furnish hall and during part of "season" performed by both parties, is binding on both during whole of "season," see *post*, 9.

Construction.

1. If a contract in writing for the sale of goods contemplating various shipments names no times of payment the price of each shipment is payable on delivery. *National Contracting Co.* v. *Vulcanite Portland Cement Co.* 247.

2. In a suit in equity to enforce specifically an alleged agreement to purchase certain bonds from the plaintiff the following facts appeared by the bill, to which the defendant demurred: The plaintiff on January 1 of a certain year delivered to the defendant an agreement of option and the defendant acknowledged in writing at the foot of the agreement its delivery to him on that day. By this instrument the plaintiff agreed to sell the defendant on or before February 10 of that year $700,000 of the bonds in question on being paid a price named, and agreed "in case this option is accepted" to endeavor to procure $50,000 more of the same bonds for delivery at the same price. The agreement recited that in addition to the $750,000 of the bonds mentioned above there were $59,000 of the bonds pledged for the debts of the corporation that issued them, and the plaintiff agreed "in case this option is accepted" to sell to the defendant these bonds also at the same price. There also were other outstanding bonds which the plaintiff agreed to help the defendant to procure "in case this option is accepted" and the plaintiff also agreed "in case this option is taken up" to sell to the defendant certain shares of the corporation which issued the bonds at certain prices named. After these provisions came the following: "It is also hereby expressly understood that" the defendant "is to purchase upon accepting this option $20,000 of said bonds out of said above mentioned lot of $59,000" at the price named, the "proceeds of said sale to be applied to the payment of certain debts of" the corporation. There was another agreement made between the plaintiff and the defendant of the same date as the agreement of option relating to the coupons of the bonds named in that agreement which among other things made a provision for the coupons of the lot of $59,000 of the bonds which was conditional on the exercise of the option by the defendant. Shortly after January 1 and before February 10 the defendant paid to the plaintiff at his request $100 to be applied toward one of the debts of the corporation in question. The defendant allowed the time to expire without exercising his option and refused to buy any of the bonds. The plaintiff contended that the defendant had agreed in any case to buy $20,000 of the bonds upon accepting the instru-

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ment of option. *Held*, that the words "upon accepting this option" in the clause relating to the $20,000 of bonds meant the exercise by the defendant of the option to purchase $700,000 of the bonds and not the acceptance of the agreement of option, having the same meaning as the corresonding words in the other parts of the agreement, that the payment of $100 by the defendant at the plaintiff's request as a part of the purchase money for the bonds was not an exercise of the option and did not bind the defendant to purchase the bonds, that the conduct of the parties in doing nothing about the $20,000 of bonds when the agreement of option was delivered tended to support the construction of the contract adopted by the court, and that the bill should be dismissed. *Martyn* v. *Hitchings*, 71.

Whether, on evidence, an implied warranty that pulley furnished for certain purpose was of certain size could be found, see SALE.

Construction of agreement in writing made before expiration of lease extending its term, and effect of oral agreement made previous to agreement of extension, see LANDLORD AND TENANT, 3–5.

Covenant in lease of land with lessees and heirs and assigns providing for extension of lease and termination or, in alternative, payment for improvements which "they, the said lessees may have put thereon," includes payment for improvements by assignee or subtenant of lessee, and runs with land, see LANDLORD AND TENANT, 1.

Construction of writtten agreement for hiring hall for socials once a week during a "season" made by agent in behalf of undisclosed principal, and agent's right to bring action thereon in own name, see EVIDENCE, 8; AGENCY, 4, 5.

Construction of contract between one lending money to another starting in business, by terms of which borrower is to pay share of profits to lender, as bearing on liability of lender as partner or undisclosed principal of borrower, see PARTNERSHIP, 8.

Where one has sold good will to partnership composed of two persons and has agreed not to carry on business for certain period within certain district unless purchasers shall cease within that period to carry on business within that district, fact that one of purchasing partners sells to other who continues in business does not release original seller from agreement, see EQUITY JURISDICTION, 9.

Contract in writing for sale of cement to be delivered in various shipments mentioning no time of payment, where parties have made and received payments thirty days after date of delivery of each shipment and custom of cement trade at place of delivery is for such payment, construed as to time of payment and rights of parties *inter se* on failure of buyer to pay for shipments when payments are due, see *ante*, 1; *post*, 3–5, 7, 8.

Effect of Custom or Usage.

3. In an action against a manufacturer of cement for alleged failure to deliver cement in various shipments as required by a contract with the plaintiff containing no provision as to times of payment, the defendant

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may show that it was "a usual custom" of the cement trade at the place of delivery, when cement was sold by manufacturers to consumers and no special agreement was made as to times of payment, to make payments in thirty days after delivery. *National Contracting Co.* v. *Vulcanite Portland Cement Co.* 247.

For Benefit of Third Person.

Promise of owners of shares in hotel, legal title to which was in trustees, made to trustees for benefit of plaintiffs who thereupon furnished to the hotel laundry machinery, equipment and supplies, held enforceable in equity on facts, see EQUITY JURISDICTION, 6.

Implied: Common Counts.

One who was member of partnership and in its employ and, under contract with one copartner which bound such copartner to purchase his interest on his choosing to leave firm's employ, had notified copartner that his employment had ceased and offered his shares under this contract, but who nevertheless had continued to render valuable services for partnership with knowledge and without dissent of remaining copartners, may recover value of such services in suit for general accounting, see PARTNERSHIP, 2.

Modification by Conduct.

4. If a contract in writing for the sale of goods contemplating various shipments names no times of payment, so that its legal effect is to make the price of each shipment payable on delivery, it may be shown that the parties to the contract by their conduct in regard to the bills that were rendered for the various shipments and their payment modified the legal effect of the contract so as to make the terms of payment cash in thirty days after the delivery of each shipment. *National Contracting Co.* v. *Vulcanite Portland Cement Co.* 247.
5. In an action on a contract in writing for the sale of goods contemplating various shipments, if it appears that the contract named no times of payment so that its legal effect was to make the price of each shipment payable on delivery but that all the bills were made out by the seller with a statement to the effect that payment should be in cash thirty days after the delivery of each shipment and that the buyer never objected to this and acted in a way to indicate that he adopted this modification of the contract, a finding is warranted that the contract was so modified. *Ibid.*

Ratification.

If one who has purchased goods transfers them to corporation afterwards created, corporation merely on such facts is not liable for price, either as ratifying original contract or in any other way, see CORPORATION, 1, 2.

Contract with one about to purchase real estate for furnishing work and materials for building thereon needs no ratification after purchase of real estate to make it enforceable in establishing mechanic's lien, see MECHANIC'S LIEN, 4.

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Assignment.

Assignment by corporation to its successor on reorganization of contract it had made with another corporation manufacturing and selling printing presses, by terms of which manufacturing corporation sold it press and agreed not to sell presses to any other person to be used for same purpose, transfers right of action for breach of contract which occurred before assignment, but does not assign right to further enforce contract, see ASSIGNMENT.

Validity.

6. A contract in writing between a corporation which prints and sells strip tickets used by transportation companies and a corporation manufacturing an improved printing perfecting press, by which the manufacturing corporation sells a press to the printing corporation and agrees not to sell this type of press to other customers to be used by them for a similar purpose but reserves the right to make and sell the press for other uses for which it may be adapted, is valid. *New York Bank Note Co.* v. *Kidder Press Manuf. Co.* 391.

Contract for sale of waterworks plant by Revere Water Company to town of Winthrop which was held completed and valid under St. 1905, c. 477, and enforceable by bill in equity for specific performance, see MUNICIPAL CORPORATIONS, 5.

Defence in suit in equity that contract is invalid because in violation of anti-trust law, 26 U. S. Sts. at Large, 209, if relied on, must be set up specifically in answer, see EQUITY PLEADING AND PRACTICE, 6.

Agreement by street commissioners of city of Boston not to assess betterments for laying out of street not made under St. 1902, c. 503, is not enforceable, and such agreement, contained in deed to city dated when it was practice of commissioners to accept such deeds but not delivered until such was not their practice and then by them pigeonholed, will not sustain action for repayment of betterments paid under protest, see BOSTON, 1, 2.

Performance and Breach.

7. One who contracts for the purchase of goods by instalments has no right to demand a continued delivery of the goods and at the same time withhold payments due for instalments already received to protect himself from anticipated breaches of contract by the seller. *National Contracting Co.* v. *Vulcanite Portland Cement Co.* 247.

8. Under a contract for the sale of goods to be delivered in various shipments and paid for in cash thirty days after the delivery of each shipment, if the buyer is behindhand in his payments the seller may refuse to deliver more goods until the goods already delivered are paid for in accordance with the terms of the contract. *Ibid.*

9. An agreement to hire a hall on Saturday night of each week during a season lasting to a certain date, which has been accepted by the acts of the person authorized to furnish the use of the hall and during a part of

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the season has been performed by both parties, is binding on both of them for the whole of the season, and the obligation to pay for the hall is not confined to its use and occupation. *Buffington* v. *McNally*, 198.

10. If one who is employed as the sole manager of a business corporation within a certain territory for a period of three years is informed orally by an agent of the corporation who has authority to discharge him that he is discharged, and later in the day he receives a letter from the defendant informing him that his services as manager terminate on the next day, he has the right to treat the discharge as occurring at the time of the conversation, and an action brought by him against the corporation for the breach of contract which is begun after the conversation and before his receipt of the letter can be found not to have been brought prematurely, especially if there is evidence warranting a finding that the letter was but a subterfuge to render the action brought of no effect. *Shugg* v. *American Shoe & Leather Association*, 167.

Where veteran is employed by city as laborer under R. L. c. 19, §§ 23, 24, and rules of civil service commissioners, and then is discharged or refused employment in violation of those provisions, and his place given to another not a veteran, he may recover damages in action of contract without first resorting to writ of mandamus, see VETERAN, 2, 5.

Unlawful interference with contract rights as ground for maintenance of suit in equity by pointers to enjoin strike of bricklayers' and of stone masons' unions in refusing to work for contractors who employed plaintiffs, see LABOR UNION, 1–6.

Mechanic's lien can be established for work and materials furnished under contract with one about to purchase real estate before the purchase as well as for those furnished after the purchase, see MECHANIC'S LIEN, 3.

Where contractor made oral contract with alleged owner of real estate, and it was among other things agreed that written contract should be drawn later, and contractor acted upon oral contract, and contract drawn later did not in any essential particular alter it, contractor in mechanic's lien proceedings may rely on date of oral contract as date of his lien, see MECHANIC'S LIEN, 6.

CONVERSION.

If the owner of a building, after permitting a piano which has been leased to one of his tenants to be moved into the tenant's apartment by temporarily enlarging a window, at the termination of the lease of the piano requests the owner to remove it but refuses to allow this to be done in the only practical way by again enlarging the window, this is not an assumption of dominion over the piano which amounts to a conversion. *Berry* v. *Friedman*, 131.

Sale of bonds held as collateral to secure payment of promissory note under special agreement held, on facts, not to amount to conversion, see PLEDGE, 4, 5.

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CORPORATION.

Contract made before Incorporation.

1. A corporation cannot ratify a contract made when it was not in existence by one who assumed to act in its behalf, although it may make a new contract on the same terms. *Koppel* v. *Massachusetts Brick Co.* 223.
2. If one sells goods to a certain person, and afterwards a corporation is created and the goods come into the possession of the corporation "by a transfer from" the person who bought them, this has no tendency to connect the corporation with the original sale. *Ibid.*

Ultra Vires.

3. If a corporation, organized under the laws of another State for the purpose of making and dealing in printing presses, sells a press to a corporation which sells strip tickets used by transportation companies and agrees in writing not to sell the same type of press to other customers to be used for a similar purpose, and receives and retains the price paid for the press and for its agreement, it cannot be permitted to repudiate its agreement as being in excess of its corporate powers. *New York Bank Note Co.* v. *Kidder Press Manuf. Co.* 391.

It is not *ultra vires* for religious society to let land upon which stands old meeting house for which it has no further use to lessee who agrees to buy meeting house, nor to covenant with such lessee or his assigns to pay for improvements on land at termination of lease or to extend lease, see RELIGIOUS SOCIETY.

Taxation.

4. St. 1904, c. 169, relating to Massachusetts corporations authorized to construct railroads in foreign countries, did not revive the provisions of R. L. c. 14, §§ 49, 52, which were repealed by St. 1903, c. 437, § 95, and such corporations are now subject to the domestic franchise tax imposed by § 74 of the last named statute, which was corrected and re-enacted by St. 1904, c. 261, and are not subject to the former tax of one twentieth of one per cent upon the par value of the capital stock for which the domestic franchise tax was substituted. *Mexican Central Railway* v. *Commonwealth*, 129.

As to exemption from taxation of lands taken and used by public service corporation for public purposes, see TAX, 12, 13.

Amendment of By-laws.

Amendment of by-laws of fraternal beneficiary corporation effecting change in rate of assessment for death benefits, see FRATERNAL BENEFICIARY CORPORATION, 1–3.

Reorganization.

Assignment by corporation to its successor, on reorganization, of contract it had made with another corporation manufacturing and selling printing presses, by terms of which manufacturing corporation sold it press and

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agreed not to sell presses to any other person to be used for same purpose, transfers right of action for breaches of contract which occurred before assignment but does not assign right to further enforce contract, see ASSIGNMENT.

Stockholder's Liability.

Liability of stockholders of insolvent foreign banking corporation for corporation's debts arising according to law of State of its incorporation after adjudication of corporate debts and exhausting of other corporate property is enforceable in this Commonwealth in actions brought by receiver appointed in such State although stockholders, defendants here, were not parties to suit against bank in which decree was made adjudging bank insolvent, adjudicating debts and appointing receiver, see EQUITY JURISDICTION, 11.

Bill in equity founded on breach of contract by corporation cannot be maintained against single stockholder without alleging him to be owner of all capital stock of corporation, or at least of majority of it, or without making corporation a party, see EQUITY JURISDICTION, 10; EQUITY PLEADING AND PRACTICE, 2, 3.

Oral promise of stockholder of corporation about to acquire its business that he will pay corporation debt if creditor will refrain from attaching corporation property is within statute of frauds, see FRAUDS, STATUTE OF.

Foreign Business Corporation.

5. The provisions of St. 1903, c. 437, §§ 58, 60, requiring a foreign corporation doing business in this Commonwealth to appoint the commissioner of corporations its attorney on whom service can be made and to file a copy of its charter or articles of incorporation, apply only to business corporations and do not relate to an educational corporation organized under the laws of another State. *Tulane University* v. *O'Connor*, 428.

6. The facts that an educational corporation organized under the laws of another State owns a hotel which it leases to a tenant, that it has caused repairs to be made on the property, and, for some purpose which does not appear, has a representative in the liquor licenses issued to its lessee, do not make it a business corporation to which the provisions of St. 1903, c. 437, apply. *Ibid.*

Unauthorized Act of Agent.

Waiver or abandonment of rule of street railway company not shown by acts of conductor or motorman, nor opinion of passenger, see NEGLIGENCE, 28, 29.

Fact that conductor of railroad train accepts from person on train ticket procured by fraud, knowing it to have been so procured, does not give person travelling on ticket rights of passenger as against corporation operating train, see CARRIER, 1, 2.

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COVENANT.

Covenant in lease of land with lessees and heirs and assigns as to extension of lease at termination or, in alternative, payment for improvements which "they, the said lessees may have put thereon," includes payment for improvements by assignee or subtenant of lessee, and runs with land, see LANDLORD AND TENANT, 1.

CUSTOM.

Effect of "usual custom" of cement trade at place of delivery on construction of contract for sale of cement as to matter not mentioned therein, see CONTRACT, 3.

DAMAGES.

For Breach of Contract of Employment.

Measure of damages in action of contract by veteran against city for discharging him or refusing him employment contrary to provisions of R. L. c. 19, §§ 23, 24, and rules of civil service commissioners is pay which he would have earned less what he did earn or should have earned in exercise of proper diligence, see VETERAN, 4.

For Breach of Negative Contract.

Damages in suit in equity against corporation manufacturing and selling printing presses for breach of contract to sell plaintiff's assignor press and not to sell any one else press to be used for certain purpose is difference between value of press purchased by plaintiff's assignor, when fitted for specific use and protected by agreement restricting sales, and market price after depreciation caused by defendant's sale in violation of contract, with interest from date of breach, see EQUITY JURISDICTION, 7.

For Property taken under Statutory Authority.

1. Where private property is taken by the right of eminent domain for a public purpose, although the Constitution requires just compensation to be made to the owner, the period of limitation within which the remedy given is to be exercised is within the control of the Legislature, and if a landowner fails to take advantage of such a remedy within the time limited his claim for damages is lost. *Raymond* v. *Commonwealth*, 486.
2. St. 1902, c. 543, amended by St. 1905, c. 224, relating to the improvement of the State House and to the height of buildings on Beacon Street and Bowdoin Street in the city of Boston, providing compensation to the owners of land within certain territorial limits whose property was damaged more than it was benefited by the improvement of the State House, the limitation of the height of buildings and by the other improvements connected therewith, did not revive any rights under St. 1899, c. 457, relating

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to buildings within an area west of the State House, as amended by St. 1901, c. 417, and as extended by St. 1901, c. 525, § 4, to include certain estates east of the State House grounds, but constituted a new taking, and a person whose right to damages under the earlier statutes had expired by limitation before he filed a petition under St. 1902, c. 543, as amended by St. 1905, c. 224, on obtaining a judgment for damages upon his petition is entitled to interest only from June 28, 1902, the date of the only taking for which his petition can be maintained. *Raymond* v. *Commonwealth*, 486.

Where devisee of property devised to her for life "with the right to dispose of the same as she shall think proper from the time of her death" conveys property to trustee to dispose of as she shall direct and then by her direction trustee conveys to her absolutely, she is entitled to entire award if land is taken by right of eminent domain for public purpose, see DEED, 2.

Petition for damages under statute for taking by right of eminent domain of alleged easement in gross to maintain certain pond for purpose of cutting ice cannot be maintained on petitioner showing use of pond by him for cutting and taking ice under oral permission of his father, who owned land under pond, for more than nineteen and less than twenty years, and that for more than year before that period he worked on land by odd jobs, see EASEMENT, 1, 2.

Petition for damages for taking of alleged easement in gross to maintain pond for purpose of cutting ice, where by same instrument of taking land under pond was taken, must be filed "within two years after actual taking," as provided by St. 1895, c. 488, § 14, as amended by Sts. 1899, c. 342, 1900, c. 108, §§ 1, 2, 1901, c. 498, 1904, c. 186, and provisions of amending statutes extending period of limitation as to takings of water rights where no land is taken in connection with such water rights have no application, see METROPOLITAN WATER SUPPLY ACT.

Interest.

8. Where a plaintiff is entitled to damages for a breach of contract he also is entitled to interest from the date of the breach as compensation for delay in payment. *New York Bank Note Co.* v. *Kidder Press Manuf. Co.* 391.

Computation of interest on award of damages for taking of private property by right of eminent domain for public purposes where right under earlier statute was barred by limitation and damages could be awarded only under later statute, see *ante*, 2.

DECEIT.

Where the parties to an oral contract differ as to what are their respective rights under it, and one of the parties to the contract, relying upon the soundness of the claim of the other party based on his assertion as to what the contract is in fact or in law, makes a voluntary payment of money to that party, and afterwards it turns out that the claim was unsound, the party who paid the money cannot maintain an action of tort

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for deceit against the party who made the claim which he chose to admit. *Bilafsky* v. *Conveyancers Title Ins. Co.* 504.

DEED.

1. Where the word "about" is used in a deed in connection with a correct statement of distance it is treated as having no effect. *Roberts* v. *Welsh*, 278.

2. A testator devised to his adopted daughter "the use or rent of my mansion house and land . . . for and during her natural life with the right to dispose of the same as she shall think proper from the time of her death." There was no devise over. The will provided that the executor within two years from the death of the testator should dispose of the balance of his estate to a charity named. The testator's adopted daughter during her lifetime appointed the property to a certain person in trust to convey and dispose of it as she should direct, and this person by her direction conveyed it to her in fee simple. *Held*, that by the deeds the devisee became seised of the property in fee, and that on a petition for damages for a property right taken by eminent domain under statutory authority she was entitled to the whole award. *Raymond* v. *Commonwealth*, 486.

Agreement to save grantor of real estate harmless from assessments for betterments for laying out of new street, contained in deed to city of Boston dated when it was practice of street commissioners to accept such deeds but delivered to them when such was not their practice and by them pigeonholed, evidence not showing deed to have been accepted, is not enforceable, see BOSTON, 2.

Effect of declaration that declarant holds land in trust for partner, J. R., and himself, for benefit of firm till dissolution, then, after settlement of firm affairs, that "rest and residue" be held in trust one half for declarant and heirs and one half for J. R. and heirs, with proviso that "at request of any party" trust shall cease and conveyances be made to cause title to stand one half in declarant and heirs and one half in J. R. and heirs as tenants in common is to give J. R. equitable estate in fee simple which he may devise, see TRUST, 1.

DEVISE AND LEGACY: CONSTRUCTION.

Heirs at Law.

1. The heirs at law of a child of a testator, to whom the testator has made a devise in case of default of issue of such child at the time of such child's death, necessarily are to be determined at the time of the death of the child in question. *Gray* v. *Whittemore*, 367.

2. Where real and personal property are included in a single provision of a will by which the income is to be paid to beneficiaries for life and at the expiration of the life interests the trustees are to pay and transfer the whole property to the "heirs at law" of a certain person, if there is noth-

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ing in the will to show that the testator intended otherwise, the whole property will go to those who would inherit the real estate of the person in question. *Gray* v. *Whittemore*, 367.

3. The right of a surviving husband under Pub. Sts. c. 124, § 1, to the real estate of his wife in fee to the amount of $5,000 in case of her death without issue entitles him in this event to share to this amount in a devise to the heirs at law of his wife, unless a contrary intent is shown by the will, and the fact that the devise to the heirs at law of the wife is preceded by a life interest in the husband himself does not indicate such contrary intent. *Ibid.*

4. A testator by his will gave a life estate to his wife with remainders to his children for life, and then in substance directed his trustees upon the death of any of his sons to pay such son's share of income to his widow, if any, during her widowhood; upon the death of any of his daughters to pay her share of income to her surviving husband, if any, for life; and upon the death of any of his children leaving no surviving widow or husband, or the death of any surviving husband or the death or marriage of any such widow, to pay or transfer a proportional share of the principal sum to the issue, if any, of his deceased son or daughter, and in the case of default of such issue at the time of such decease or marriage to pay or transfer such share to the heirs at law of such deceased son or daughter. *Held*, that surviving husbands of the testator's daughters who had died without issue, under Pub. Sts. c. 124, § 1, which was in force at the times of the deaths of their respective wives, were entitled to share each to the amount of $5,000 in the remainders to the "heirs at law" of their wives, the enjoyment of which was postponed until the termination of their own life interests. *Ibid.*

Specific or General.

5. A bequest to a sister of the testatrix of "all moneys or estate that may be recovered" in a certain action named is a specific legacy, and under R. L. c. 135, §§ 26, 27, the proceeds of the judgment obtained by the executor in the action are to be paid in full to the legatee without being diminished by contribution for the payment of debts if there is property devised generally sufficient for the payment of the debts. *Robinson* v. *Cogswell*, 79.

6. A testator after making a specific devise of certain real estate to two of his children devised all the remainder of his real estate to three other of his children "to be divided equally between them in three equal shares." On a petition to marshal the assets of the testator's estate, it was *held*, that the last named devise was general and not specific, and that the real estate covered by it must be applied to the payment of debts before resorting to the real estate specifically devised. *Cooney* v. *Whitaker*, 596.

What Estate.

7. A testatrix devised and bequeathed one third of the residue of her estate to a niece "and the remaining two third parts to S. . . . in trust and confidence, nevertheless, that he the said S. shall keep the said two thirds

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invested and from time to time, as he shall deem expedient, pay over the net income thereof to my nephew F." The nephew named owing to an illness in childhood did not go to school after reaching the age of twelve years, had no taste for books, and although he lived to the age of thirty-six years never engaged in business for himself. *Held*, that the gift to the nephew was merely of the income for life and that at his death the two thirds of the residue of which he had enjoyed the income, which then consisted of real estate, passed to the heirs at law of the testatrix as undevised property. *Stearns* v. *Stearns*, 144.

8. A testatrix bequeathed one half of her personal property to her husband during his life and after his decease bequeathed it to her daughter "absolutely, if she shall be living at the time of my husband's decease, subject to certain other bequests hereinafter made." Five paragraphs enumerating the other bequests referred to were preceded by the following direction: "In the event that my said daughter shall not be living at the time of the decease of my said husband, then immediately upon his decease, I direct my executrix hereinafter to be named, to pay the following bequests." One of the five bequests was to the trustees of a certain chapter of a certain order "in case the said chapter shall be in existence at the death of my said husband," and there was a further direction to pay the five bequests from the personal property of her estate remaining at the death of her husband if sufficient, or, if not sufficient, that a sufficient amount of the real estate remaining at the death of her husband should be sold to pay the bequests. *Held*, that the gift to the daughter was an absolute one subject to the five bequests, and that these bequests were payable immediately on the death of the husband and were not deferred until the death of the daughter. *Newcomb* v. *Pine Grove Cemetery*, 214.

Vesting.

9. A testator by his will gave a life estate to his wife with remainders to his children for life, and then in substance directed his trustees upon the death of any of his sons to pay such son's share of income to his widow, if any, during her widowhood; upon the death of any of his daughters to pay her share of income to her surviving husband, if any, for life; and upon the death of any of his children leaving no surviving widow or husband, or upon the death of any surviving husband or the death or marriage of any such widow, to pay or transfer a proportional share of the principal sum to the issue, if any, of his deceased son or daughter, and in the case of default of such issue at the time of such decease or marriage to pay or transfer such share to the heirs at law of such deceased son or daughter. *Held*, that the words "in the case of default of such issue at the time of such decease or marriage" referred, not only to the death of a child unmarried or of a surviving husband or to the death or remarriage of a surviving wife, but also to the death of any child of the testator whether or not leaving a surviving husband or wife; that in case of those children of the testator who died leaving a husband or wife but no issue, the remainders in the heirs at law of the testator's children vested upon the

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respective deaths of those children, their enjoyment being postponed until the death of the surviving husband or the death or remarriage of the surviving wife; and that, in case of those children of the testator who died leaving issue and also a surviving husband or wife, the remainders in the issue vested either at the death of the testator or at the time of the death of each child, the right of present possession being postponed until the expiration of the intervening life estate, it being immaterial to determine whether the further remainders to the heirs at law of these children upon a failure of issue vested at either of those times or whether they were void under the rule against perpetuities. *Gray* v. *Whittemore*, 367.

Trust.

Devise to testator's wife of all estate "for the purpose of maintaining herself and our children to her and her heirs forever" creates no trust, see TRUST, 2.

Devise of real estate in fee simple followed by numerous provisions as to its management and disposition and as to payments to be made from proceeds of its sale creates a trust although word "trust" is not used, see TRUST, 3.

Words, "but it is my wish and desire that if my wife has received from my daughter and her family the affection and respect, to which she is entitled, that she then will appoint said share . . . to my daughter and her children," following devise to wife in trust with power of appointment by will, held not to create precatory trust, see TRUST, 4.

Perpetuities.

10. In construing a provision in a will this court will adopt a construction which is effectual to accomplish the object which the testator had in view rather than one which will defeat his purpose by creating a perpetuity which the law will not sustain. *Gray* v. *Whittemore*, 367.

11. If by the terms of a devise or legacy the estate or interest created must begin within the time prescribed by the rule against perpetuities it is not made invalid by the fact that it may extend beyond that period. Thus life estates given to the husbands and wives of the testator's children who respectively may survive them are valid; and so is a limitation to the issue of such of the testator's children as shall die leaving no husband or wife. *Ibid.*

12. *Semble*, that a remainder which is intended by a testator to vest after a life estate in one of his children followed by a life estate in the surviving husband or wife of such child would be void under the rule against perpetuities, because the child in question might marry a person not in being at the time of the death of the testator and such person might be the survivor of the marriage and might not die until after the expiration of twenty-one years from the death of the testator's child. *Ibid.*

13. If a will provides that after life estates in the children of the testator the remainders shall go for life to any surviving husband or wife of a child of the testator and after the death of such husband or wife shall

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then and not before vest in the issue of such child of the testator or in default of such issue in his heirs, and also provides that upon the death of any of the testator's children without leaving a surviving husband or wife the remainder shall go to the issue of such child, this last named remainder is valid without regard to the question whether the remainder after the death of a surviving husband or wife is void under the rule against perpetuities, because the two remainders are limited upon wholly distinct and separate events, either of which, if it occurs, will exclude the existence of the other. *Gray* v. *Whittemore*, 367.

DIVORCE.

See MARRIAGE AND DIVORCE.

DOWER.

1. A widow is not entitled to dower in a vested remainder. *Gray* v. *Whittemore*, 367.
2. In this Commonwealth a wife has no dower in real estate in which her husband's title was merely equitable and of which he never had the legal seisin at any time during the coverture. *Seaman* v. *Harmon*, 5.
3. A wife had obtained a divorce against her husband for the cause of adultery, and thereby under R. L. c. 152, § 24, was "entitled to her dower in the same manner as if he were dead." Her husband, before the divorce and while he was living apart from her, had procured the conveyance of certain real estate by its former owner to the husband's sister, in trust to pay him the rents and profits during his life and to allow him to use and enjoy it during that time, also, at his request, to sell and convey it or any part of it free from the trust and to pay the proceeds to him, to mortgage it at his request, and to convey it to such person as he might direct by his last will, and in default of such direction to convey it to his heirs at law. At the request of the husband his sister as trustee conveyed the real estate by a mortgage deed to a mortgagee who was a purchaser for value in good faith and who recorded the mortgage. Later the mortgagee advertised the land for sale for a breach of a condition in the mortgage, and the wife brought a suit in equity against the mortgagee to restrain the foreclosure. The plaintiff's divorced husband had died intestate. *Held*, that the defendant's title was complete against the plaintiff's claim of dower, and that the bill must be dismissed. *Ibid.*
4. Comments by HAMMOND, J. on the doctrine of instantaneous seisin as applied to dower, showing that even where the seisin of the husband was instantaneous the wife may have dower if the seisin was in the husband beneficially for his own use. *Libbey* v. *Tidden*, 175.

Doctrine of instantaneous seisin as applied in case of dower also applies on petition to establish mechanic's lien, and mortgagee's rights precede lienor's only when mortgage was made to secure purchase money or some part of it, see MECHANIC'S LIEN, 1.

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EASEMENT.

By Prescription.

1. Where the owner of land on which there is a pond gives his son oral permission to cut ice upon the pond and afterwards the son erects ice houses and sells ice from the pond for a series of years, whether these acts of the son would warrant a finding that his use of the pond was adverse and not permissive, so that if continued for twenty years he might acquire an easement by prescription, *quaere*. *Carville* v. *Commonwealth*, 570.
2. Where a petitioner for damages under a statute for the taking by the right of eminent domain of an alleged easement in gross to maintain a certain pond for the purpose of cutting ice, shows that the land under the pond belonged to his father and that the petitioner a little more than nineteen but less than twenty years before the taking built a dam to raise the waters of the pond and shortly afterwards built ice houses there, the fact that during the year before the building of the dam the petitioner worked by odd jobs on the land does not show an exclusive occupation nor a use of the land for cutting and taking ice such as would mark the beginning of an adverse use and extend it to a period of twenty years. *Ibid.*

Taking of land under St. 1893, c. 277, for supplying Walpole with water held to include taking of easement of lower riparian owner of right to flow land taken. Whether such taking would deprive such owner of right to build dam under mill act and set back water, paying damages to owner, was not decided, see WATERWORKS, 1, 2.

ELECTION.

Election of receiver to proceed by actions at law to enforce liability of stockholders of foreign banking corporation estops him from at same time prosecuting same causes by cross bill in equity in suit by stockholders to restrain him from proceeding with actions at law, see EQUITY JURISDICTION, 4.

One who was member of partnership and in its employ cannot at same time maintain suit in equity to enforce specific performance of contract of his copartner to purchase his interest at such time as he chose to leave firm's employ and so notified copartner, and also another suit for accounting and for share of profits accruing to interest he had offered to copartner under contract after he had offered it, see PARTNERSHIP, 1.

Where at hearing of motion to dismiss reference for arbitrament and award which although "allowed" by court is void because not in conformity with R. L. c. 194, party makes requests for rulings that reference and award are valid under statute, he cannot take ground afterwards that reference although void under statute is valid as reference for assessment of damages by order of court, see PRACTICE, CIVIL, 8.

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ELECTIONS.

Under R. L. c. 11, §§ 266, 267, except in towns where official ballot is used or where officers are "voted for on one ballot," there can be no recount of votes cast for officer of town after result of election has been announced and recorded and meeting adjourned, see MUNICIPAL CORPORATIONS, 1.

ELEVATED RAILWAY.

Actions by employees of elevated railway company for personal injuries due to alleged negligence of company or its superintendent, see NEGLIGENCE, 4, 26.

Duty of company operating electric elevated railway as to providing platforms for safe passage between cars, see NEGLIGENCE, 40.

Duty of company operating electric elevated railway to provide against injuries to travellers on street below elevated structure due to particles of metal falling from "contact shoe," see NEGLIGENCE, 41–45.

EMINENT DOMAIN.

Damages for property taken by right of eminent domain, see DAMAGES, 1, 2; DEED, 2; EASEMENT, 1, 2; METROPOLITAN WATER SUPPLY ACT.

Failure to claim compensation for private property taken by right of eminent domain for public purpose within time fixed by Legislature precludes recovery, see DAMAGES, 1.

Taking of land for supplying Walpole with water under St. 1893, c. 277, held to include taking of right of lower riparian owner to flow land taken, and it is immaterial that no personal notice of the taking was given to such owner if notice was given by recording taking in registry of deeds in accordance with statute. Whether such taking would deprive such owner of right to build dam under mill act and set back water, paying damages to owner, was not decided, see WATERWORKS, 1, 2.

EMPLOYER'S LIABILITY.

Employer's liability for personal injuries to employee, see NEGLIGENCE, 3–26.

EQUITABLE CONVERSION.

Fund resulting from sale of real estate by trustees empowered by will to sell and convey trust property and to make new investments retains original character until it reaches one who has right to treat it as his own absolutely, see TRUST, 13.

EQUITY JURISDICTION.

Laches.

1. A bill in equity by the heirs at law of a person who died twenty years before the filing of the bill, claiming certain land as against the widow

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and sole devisee of the deceased and those claiming under her who have been in open enjoyment of the land during the whole of that period under a claim of right, is barred by laches. *Reardon* v. *Reardon*, 448.

2. In a case of actual fraud mere delay on the part of the defrauded party seeking relief in equity, especially where there has been no change in the situation of the parties in respect to the matter in which the relief is sought, will not deprive him of his right to relief if until a short time before filing his bill he was ignorant of the fraud and had no knowledge of facts which in the exercise of reasonable prudence ought to have put him on inquiry. *Manning* v. *Mulrey*, 547.

Suit under R. L. c. 141, § 10, by creditor against executors brought after expiration of two years' statutory period of limitations held on facts maintainable and plaintiffs held not guilty of laches, see *post*, 17.

Lapse of many years during which corporation has been engaged in litigation in another State founded on contention contrary to that which it alleges as ground for petition to intervene in suit in this Commonwealth, coupled with fact that granting petition would delay doing of justice between parties already before court, is sufficient to warrant denial of petition, see *post*, 3.

No laches sufficient to bar bill in equity by heir at law to set aside fraudulent sale and conveyance of real estate of intestate by administrator where plaintiff was niece of administrator in relations with him such as to lead her to repose confidence in him and refrain from inquiry, had received only constructive notice of terms of sale and did not know that real estate had been conveyed to administrator until year and two months before bill was filed, although that was twenty-two years after conveyance, see EXECUTOR AND ADMINISTRATOR, 4.

Statute of Limitations.

Bill in equity for relief after period of special statute of limitations has run, see *post*, 17.

Bill for accounting between partners filed more than six years after dissolution of partnership is barred by statute of limitations, see LIMITATIONS, STATUTE OF.

Estoppel in Equity.

3. The petition of a foreign corporation to intervene in a suit in equity in this Commonwealth properly may be denied when for many years the petitioning corporation has been engaged in litigation in another State founded upon a contention contrary to that which it alleges as the ground for its admission as a party, and where its admission would delay the doing of justice between the parties already before the court. *New York Bank Note Co.* v. *Kidder Press Manuf. Co.* 391.

4. The stockholders in this Commonwealth of an insolvent corporation organized under the laws of another State brought a suit in equity against the receiver of the property of that corporation appointed in the other State to restrain him from prosecuting actions at law against the plaintiffs to enforce their liability as stockholders for the debts of the corporation

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under a decree made by a court of the other State. The defendant filed a cross bill to enforce the liability of the plaintiffs for the debts of the corporation. *Held*, on demurrer, that the cross bill could not be maintained, as the defendant in the principal suit by bringing the actions which the plaintiffs sought to restrain had elected to proceed at law. *Francis* v. *Hazlett*, 137.

5. In a suit in equity by persons claiming as heirs at law of J. R. for an accounting for rents and profits and for a conveyance of their alleged shares in certain land against a person who had held the legal title to the land for the benefit of himself and J. R., copartners in business, it appeared that J. R. had an equitable fee as a tenant in common of the land in question, which he devised to his wife, that the plaintiffs were legatees under the will of the widow of J. R. and agreed that the business in which her estate was invested should be carried on by the executors of her will and the defendant for the benefit of all the parties in interest, that the business was so carried on for eight years at the end of which time by agreement of all the parties a corporation was formed which took over the business, that the plaintiffs received shares of stock in the corporation in proportion to their interests under the will of the widow of J. R., that the interest of J. R. in the land in question was treated as part of the estate of the widow and was conveyed to the corporation with the other property of her estate, and that the plaintiffs gave receipts for the full payment of their legacies under the will of the widow. *Held*, that the plaintiffs were estopped to assert a claim to any interest in the land as heirs at law of J. R. *Reardon* v. *Reardon*, 448.

Remedy at Law.

Whether, in suit in equity to enjoin labor union from unlawful interference with contract between plaintiff and owner of building for doing certain work thereon, bill would be dismissed on ground that damages in action at law would be adequate compensation for breach of contract, *quaere*, see LABOR UNION, 4.

Accounting.

Bill for accounting between partners filed more than six years after dissolution of partnership is barred by statute of limitations, see LIMITATIONS, STATUTE OF.

In suit for accounting against successors in title of administrator who by actual fraud had procured sale of intestate's real estate to himself, defendants cannot be permitted to charge plaintiff for sums expended by testator for taxes or otherwise in preservation of estate, see EXECUTOR AND ADMINISTRATOR, 4.

One who was member of partnership and in its employ cannot at same time maintain suit in equity to enforce specific performance of contract of his copartner to purchase his interest at such time as he chose to leave firm's employ and so notified copartner, and also another suit for accounting and for share of profits accruing to interest he had offered to copartner under contract after he had offered it, see PARTNERSHIP, 1.

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To restrain Action at Law.

Suit by stockholders to restrain action at law by receiver of banking corporation appointed under law of another State to enforce stockholders' liability, see *post*, 11.

To avoid Circuity of Action.

6. If the owners of all the shares in a hotel, the legal title to which is in trustees under a declaration of trust, request the trustees in writing to accept a proposition to lease the hotel which contains a condition that laundry furnishings and kitchen fixtures shall be provided by the owners, and agree to furnish the money (not exceeding $4,000) necessary to provide for the kitchen and laundry furnishings and fixtures required under the terms of the proposition, and if the trustees show this letter to the persons offering to lease the hotel and also show it to a firm engaged in selling and installing laundry machinery who thereupon furnish the materials and labor required for the equipment of the laundry of the hotel and the lease is made, and if the bill for the laundry machinery thus furnished is approved by the trustees and its amount is within the limit fixed by the letter of the shareholders, the members of the firm who furnished the laundry machinery may maintain a suit in equity against the shareholders to compel them to pay the bill, their promise made to the trustees for the benefit of the plaintiffs being enforced directly to avoid circuity of action. *Poland* v. *Beal*, 559.

To remove Cloud on Title.

Deed of water company to town delivered and recorded in accordance with illegal vote of town meeting is cloud on title which town by bill in equity may have removed when it legally has procured right to conveyance by agreement under statute subsequent to deed, see MUNICIPAL CORPORATIONS, 4.

To enforce Condition in Grant of Location.

Conditions as to paving and repairing of surface of streets contained in grant of location by aldermen of city to street railway company enforced in suit by mayor and aldermen under R. L. c. 112, § 100, see STREET RAILWAY, 2.

To enjoin Conspiracy.

Suit in equity by pointers to enjoin strike by members of bricklayers' and of stone masons' unions in refusing to work for contractors who employed plaintiffs sought to be maintained on ground of conspiracy, see LABOR UNION, 1–6.

To enforce Contract for Benefit of Third Person.

Promise of owners of shares in hotel, legal title of which is in trustees, made to trustees for benefit of plaintiffs who thereupon furnished to the hotel laundry machinery, equipment and supplies, held enforceable in equity on facts, see *ante*, 6.

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Specific Performance of Contract.

Bill in equity for specific performance of contract, where plaintiff contended that words "upon accepting this option," occurring in agreement of option for purchase of bonds, referred to acceptance of agreement of option, dismissed because court held that words referred to exercise of option of purchase, see CONTRACT, 2.

Specific performance decreed of contract of Revere Water Company to sell its plant in Winthrop made in accordance with St. 1905, c. 477, although a town meeting held two months after town's acceptance of act had rejected company's offer, a meeting held two months later having accepted it, see MUNICIPAL CORPORATIONS, 5.

To compel Performance of Negative Contract.

7. In a suit in equity by the assignee of the property and choses in action of a corporation which was engaged in the business of printing and selling strip tickets to transportation companies, against a manufacturing corporation which had sold a press to the plaintiff's assignor under a valid contract in writing by which it agreed not to sell this type of press to other customers to be used by them for a similar purpose, seeking to recover damages for a breach of this contract before the assignment by the sale of a press to another corporation to be used for a similar purpose, the measure of damages is the difference between the value of the press purchased by the plaintiff's assignor when fitted for use in printing strip tickets and protected by the restriction of the contract and its market price after the depreciation caused by the defendant's sale in violation of the contract, with interest from the date of the breach. *New York Bank Note Co.* v. *Kidder Press Manuf. Co.* 391.

8. In a suit in equity by the assignee of the property and choses in action of a corporation which was engaged in the business of printing and selling strip tickets to transportation companies, against a manufacturing corporation which had sold a press to the plaintiff's assignor under a valid contract in writing by which it agreed not to sell this type of press to other customers to be used by them for a similar purpose, to recover damages for a breach of this contract by the sale of a press to another corporation to be used for a similar purpose, a decree was made that the plaintiff was entitled to damages in a certain amount named, but the further facts appeared that the plaintiff first had brought an action of contract in this Commonwealth, to which the suit in equity was ancillary, and then had brought an action in another State against the corporation to which the press had been sold by the defendant in violation of its contract, and in the action in the other State had been compelled to join the defendant as a party, and thereafter had received from the purchasing defendant in the action in the other State a sum of money in settlement of all damages and had executed a release under seal to that defendant of all damages and demands, and had consented to an order discontinuing the action in the other State as against the

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defendant paying the money, the release executed by tl
taining a declaration that it was not intended to release
the plaintiff had against the defendant in the Massach
sold the press to the plaintiff. *Held*, that, even if the
the plaintiff of his claim against the defendant in the re
that instrument from being a full discharge, the payn
treated as a partial satisfaction and must be applied by
reduction of the sum awarded to him by the decree. *1
Note Co.* v. *Kidder Press Manuf. Co.* 391.

9. In a suit in equity by a milliner to restrain the defendan
on the millinery business in Boston after having sold h
the plaintiff and the plaintiff's partner and agreed not t
millinery business in Boston for the term of ten years, i
the plaintiff and her partner after purchasing the defen
dissolved their copartnership and that the plaintiff's part
interest in the business to the plaintiff who thereupon
partnership for the purpose of carrying on the milliner
transferred to her new partner half of her interest therein.
by which the defendant and the defendant's partner s
will to the plaintiff and the plaintiff's former partner c
vision that if at any time before the expiration of ten ye
and her partner should cease to carry on the millinery bus
the defendant and her partner might at such time, i
re-engage in the millinery business in Boston either jointl
The defendant contended that because the plaintiff's pa
to the plaintiff the defendant's negative contract was at
might re-engage in business. *Held*, that the plaintiff a
partner had not ceased to carry on the millinery busi
within the meaning of the contract, and that the plaintiff, h
all the interest of her former partner represented both th
herself and was entitled to enforce the contract. *Jenkins* v

Defences of invalidity of contract, because in restraint of tra
made by a corporation *ultra vires*, set up in suit to compel
negative contract, see EQUITY PLEADING AND PRACTICE
TION, 3.

In suit to enforce performance of negative contract made by
two persons, both such persons need not be made plaintiff
owns rights of other by purchase, see EQUITY PLEADING AN

Suits affecting Stockholders of Corporation.

10. A bill in equity against an individual defendant founded
contract by a corporation cannot be maintained upon alleg
defendant owns a large amount of the capital stock of tl
that he is "the dominant factor therein" and controls a
policy, without alleging that he is the owner of all of th
or even of a majority of it. *Aberthaw Construction Co.* v.

11. If by the law of another State, in which a banking corpo
become insolvent was organized, the liability of the stock

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corporation for its debts can be enforced in a suit brought by the receiver only after the amount of the debts has been ascertained judicially and other corporate property has been exhausted, and if a court of that State having jurisdiction both of the subject matter and the parties in a suit brought against the insolvent corporation asking for the appointment of a receiver has made a decree declaring that the assets of the corporation have all been disposed of and the proceeds paid out and applied by the receiver in pursuance of the order of the court, that there are adjudicated claims amounting to a large sum named, and that the corporation is wholly insolvent and has no property of any kind out of which to pay the amounts due to its creditors, and authorizing and instructing the receiver to bring suits against the several stockholders of the corporation, this decree is binding on the stockholders of the insolvent corporation in this Commonwealth who personally were not made parties to the suit in which the decree was made; and if the receiver brings actions at law in this Commonwealth against the stockholders here to enforce the decree of the other State, these stockholders cannot maintain a suit in equity to restrain the receiver from prosecuting such actions, nor can they be allowed to show that all other corporate property had not been exhausted by the receiver before the actions were brought. *Francis* v. *Hazlett*, 137.

To enjoin Exercise of Right given by Contract.

Equity has no jurisdiction to enjoin lessor from exercising right to terminate lease given him by lease and by agreement in writing extending lease on same terms although lessor orally had agreed that, if lessee would make agreement of extension, he might continue in possession during whole of extended period, and lessee had gone to great expense and made valuable improvements relying on such oral agreement, see LANDLORD AND TENANT, 4.

To enjoin Unlawful Interference with Contract.

Suit in equity by pointers to enjoin strike by members of bricklayers' and of stone masons' unions in refusing to work for contractors who employed plaintiff, sought to be maintained on ground of unlawful interference with contract rights, see LABOR UNION, 1–6.

Fraud.

Bill in equity to set aside conveyance by administrator of estate made on sale under order of court through an intermediary to himself held on facts to be maintainable because of fraud, see EXECUTOR AND ADMINISTRATOR, 4.

Bill for Instructions.

12. A testatrix devised all her real estate to her son and her brother in trust, and provided that two adjoining dwelling houses built by her should not be sold until the expiration of five years after her death, that one of the two houses with the furniture therein should "be used, occupied and enjoyed as and for a home" for her son, her brother, a sister and a son of the sister, and "that, whenever said dwelling shall be sold, that out of

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the proceeds of such sale" her son should be paid out of her estate the sum of $6,000, and directed "that the balance of the money or estate remaining from the sale of said dwelling houses" should be invested in suitable and profitable real estate in Brookline or Boston. She directed that her son should pay to her brother during his natural life one third of the net income of certain other real estate owned by her. The administrator *de bonis non* of the estate with the will annexed brought a bill for instructions, all the parties interested joining in the prayer, as to which of the parcels of real estate the plaintiff should sell first to pay debts and charges of administration and which parcel he should sell next if another sale became necessary. It appeared that more than five years had elapsed since the death of the testatrix, and that controversies existed among the beneficiaries so that it was impossible for them to occupy together the designated one of the two adjoining houses in the manner contemplated by the testatrix. *Held*, that in applying to the Probate Court under R. L. c. 146, §§ 6–8, for a license to sell real estate the plaintiff should ask for leave to sell the one of the two adjoining houses which was intended for occupation for five years by the beneficiaries, and also for leave to sell the adjoining house if the proceeds from the sale of the first house would not be sufficient, after paying $6,000 to the son of the testatrix, to pay the debts and charges of administration of the estate. The court, being unable to determine from the facts appearing of record whether the interests of the beneficiaries better would be promoted by selling both of the adjoining houses at the same time, or by selling first the one indicated if the sale of that one was likely to be sufficient, instructed the plaintiff that he might make his application in either form as seemed to him best. *Robinson* v. *Cogswell*, 79.

Probate Court under R. L. c. 146, §§ 6–8, has power to authorize sale of real estate by executor or administrator to pay debts of estate, and this court, on bill in equity by executor for instructions as to which of several parcels should be sold, cannot direct or control Probate Court in the matter, but, all parties in interest joining in prayer, will instruct executor how he should make application, see EXECUTOR AND ADMINISTRATOR, 5.

Partnership.

One who was member of partnership and in its employ cannot at same time maintain suit in equity to enforce specific performance of contract of his copartner to purchase his interest at such time as he chose to leave firm's employ and so notified partner, and also another suit for accounting and for share of profits accruing to interest he had offered to copartner under contract after he had offered it, see PARTNERSHIP, 1.

One who was member of partnership and in its employ and had, under contract with copartner which bound copartner to purchase his interest on his choosing to leave firm's employ, notified partner that his employment had ceased and offered his shares under contract, but who nevertheless had continued to render valuable services for partnership with knowledge and without dissent of remaining copartners, may recover value of such services in suit for general accounting, see PARTNERSHIP, 2.

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Infringement of Patent.

Suit for infringement of patent which involves inquiry into its scope and nature is within exclusive jurisdiction of federal courts, see PATENT, 1.

To remove Property from Defendant's Premises.

13. A bill in equity alleged that the plaintiff leased a piano to the tenant of an apartment in a wooden building of the defendant, that the defendant permitted a window of the apartment to be enlarged temporarily for the purpose of moving the piano in, and promised the tenant that he would give permission to remove it in the same way when necessary, that the lease became terminated and the title to the piano became vested solely in the plaintiff, that the defendant requested the plaintiff to remove the piano but refused to allow the window to be enlarged as before for that purpose, that the piano was so constructed that it could not be removed in sections without destroying it and could not be removed without making the desired opening, and that the plaintiff offered to give to the defendant a bond with sufficient sureties conditioned to make good any damages caused by the removal of the piano; praying that the defendant might be enjoined from interfering with the plaintiff in the reasonable and proper removal of his property. There was no averment in the bill that the promise of the defendant to his tenant, to allow the piano to be removed in the same way in which it was put in, was made for the benefit of the plaintiff or that it was known to him or that he acted upon it. The defendant demurred to the bill. The judge overruled the demurrer, and, it appearing that the allegations of the bill were true, and the plaintiff having filed a bond with good and sufficient sureties to make good any damage caused by the removal to the reasonable satisfaction of the defendant, the judge made a decree that the defendant be perpetually enjoined from interfering with the plaintiff in the removal of his property as set forth in the bill. *Held*, that the plaintiff, having given the defendant full security against all loss or damage and seeking to do only what the defendant originally assented to, should be permitted to make the removal in the only way in which it practically could be done, and the decree was affirmed. *Berry* v. *Friedman*, 131.

Equitable Replevin.

14. Evidence that the defendant had in his possession a certain machine belonging to the plaintiff and that when the plaintiff undertook to obtain possession of it by a writ of replevin the defendant concealed from the officer certain essential parts of the machine which had been taken from it by him so that the officer could not serve the writ properly, is sufficient to sustain a bill of equitable replevin under R. L. c. 159, § 3, cl. 1. *Pels & Co.* v. *Millen*, 13.

Review of Rulings of Board as to Street Railways.

15. At the hearing on a bill in equity filed in the Superior Court under R. L. c. 112, § 100, to review, annul, modify or amend the rulings made

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by the board of railroad commissioners in approving a street railway location granted by the board of aldermen of a city, the only evidence admissible is the proof of the evidence that was before the board of railroad commissioners when the rulings complained of were made. *Paine* v. *Newton Street Railway*, 90.

16. The provision of R. L. c. 112, § 100, giving the Supreme Judicial Court or the Superior Court jurisdiction in equity "to review, annul, modify or amend the rulings of any State board or commission relative to street railways as law and justice may require," relates only to rulings of law, and does not apply to findings and decisions upon questions of fact, and in such a proceeding the court can hear no evidence except the proof of the evidence that was before the board when the rulings complained of were made. *Ibid.*

For Relief after Claim is barred at Law by special Statute of Limitations.

17. In a suit in equity against executors under R. L. c. 141, § 10, by a creditor of the estate of the testator, whose claim had not been prosecuted within the two years prescribed by § 9 of the same chapter, it appeared that the debt was created by the plaintiff, after the testator's death, taking up certain notes which he had indorsed for the testator's accommodation, that in taking up the notes he got the bank holding them to discount his personal note for the amount due and gave to the bank as security the notes of the testator which he took up, that the personal property of the testator's estate was not sufficient to pay the debts, and one of the executors represented to the plaintiff that if a sale of the real estate was forced there might not be enough to pay the debts and that if a sale was not forced and the proceeds were sufficient the plaintiff's debt would be paid, that he urged the plaintiff not to bring an action and to persuade the bank not to sue on the testator's notes held by it as security, that the plaintiff forbore to bring action and persuaded the bank also to forbear, that before the two years of limitation expired the executors under a license from the Probate Court sold a part of the real estate and realized a substantial sum of money, more than sufficient to pay all the debts of the estate, that the plaintiff was not informed of this sale and did not learn of it until after the two years of limitation had expired. It further appeared that the executors acted in good faith, and that the plaintiff and the executors mutually were mistaken in believing that by bringing an action a sale of the land could be forced and in believing that the money due to the plaintiff could be paid at any time whether the action was brought within the two years or not. The presiding justice found that the plaintiff was not chargeable with culpable neglect. *Held*, that, even if the parties acted under a mistake of law which affected the conduct of the plaintiff, justice and equity required that the debt to the plaintiff should be paid, and that under the statute he was entitled to a judgment for the amount of his claim. *McMahon* v. *Miller*, 241.

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Slander of Title.

18. A bill in equity cannot be maintained on the ground of alleged slander of the plaintiff's title for false representations as to the character and quality of the plaintiff's property or as to his title thereto which involve no breach of trust or contract. *Aberthaw Construction Co.* v. *Ransome*, 434.

To enjoin Strike.

Suit to enjoin strike on grounds of conspiracy and of unlawful interference with contract, see LABOR UNION, 1–6.

Trust.

19. A testatrix devised all her real estate to her son and her brother in trust, and directed them to "see to it" that her sister named "be suitably and comfortably maintained during her natural life." *Held*, that the sister of the testatrix was entitled to enforce this trust by a suit in equity against the son and brother of the testatrix, and that if the defendants failed to provide such maintenance the plaintiff could have the trust administered by others in their stead. *Robinson* v. *Cogswell*, 79.

Where, during coverture, husband procures owner of real estate to convey it to his sister in trust for himself, and she, by his direction mortgages it to one who takes conveyance for value and without notice, wife, subsequently procuring divorce on grounds of adultery, cannot on husband's death restrain in equity foreclosure of mortgage, see DOWER, 2, 3.

Administrator of insolvent estate of deceased trustee who had wrongfully pledged trust property to bank cannot by suit in equity be adjudged trustee unless proceeds of pledge can be traced and identified, nor can he be compelled to use general assets of estate to pay debt to bank in full and thus release property pledged, see TRUST, 6–8.

EQUITY PLEADING AND PRACTICE.

Parties.

1. An unincorporated labor union cannot be made a party to a suit in equity to enjoin the unlawful acts of its officers and members. *Pickett* v. *Walsh*, 572.
2. A bill in equity founded on the violation of a contract cannot be maintained where the sole defendant is not a party to the contract and the party to the contract other than the plaintiff is not a party to the bill. *Aberthaw Construction Co.* v. *Ransome*, 434.
3. A bill in equity founded on a breach of contract by a corporation cannot be maintained against a stockholder of a corporation alleged to control and dictate its policy without making the corporation a party. *Ibid.*
4. In a suit in equity by a milliner to restrain the defendant from carrying on the millinery business in Boston after having sold her good will to the plaintiff and the plaintiff's partner and agreed not to engage in the millinery business in Boston for the term of ten years, if it appears that the

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plaintiff and her partner after purchasing the defendant's business dissolved their copartnership and that the plaintiff's partner sold all her interest in the business to the plaintiff and made to her an absolute and unconditional assignment of it, the plaintiff's former partner need not be made a party to the suit, having no interest which could be affected by a decree therein. *Jenkins* v. *Eliot*, 474.

Bill in equity against one individual defendant founded on breach of contract by corporation cannot be maintained without alleging that defendant is owner of all capital stock of corporation or at least of majority of it, see EQUITY JURISDICTION, 10.

Bill.

5. In a bill in equity by a dealer in pianos to enjoin the owner of a building from preventing the removal from the building of a piano alleged to belong to the plaintiff, if the bill avers that the plaintiff leased the piano to a tenant of the defendant and that the lease became terminated and the title to the property became vested solely in the plaintiff, this is a sufficient averment of title without stating the terms of the lease or the manner in which it became terminated. *Berry* v. *Friedman*, 131.

Cross Bill.

Receiver who has elected to proceed by actions at law to enforce liability of stockholders of foreign banking corporation cannot at same time prosecute same causes by cross bill in equity in suit by stockholders to restrain him from proceeding with actions at law, see EQUITY JURISDICTION, 4.

Defences.

6. If in a suit in equity by a corporation which sells strip tickets used by transportation companies, seeking damages from a corporation manufacturing an improved printing perfecting press for the alleged breach of an agreement in writing not to sell the type of press sold to the plaintiff to other customers to be used for a similar purpose, the defence that the contract sought to be enforced is void as in violation of 26 U. S. Sts. at Large, 209, commonly known as the anti-trust law, must be pleaded specially, and if the defendant files an answer and a cross bill in neither of which the point is taken, this defence is not open to the defendant. *New York Bank Note Co.* v. *Kidder Press Manuf. Co.* 391.

Amendment.

7. On an appeal from a final decree in favor of a plaintiff in a suit in equity it was ordered that on the bill being amended in a certain manner as to the parties defendant within sixty days the decree might be modified as required by this court and on being so modified should be affirmed; otherwise, that it should be reversed. *Pickett* v. *Walsh*, 572.

8. In a suit in equity to enjoin certain unlawful acts of the officers and members of an unincorporated labor union, if the union itself which has no legal entity has been joined improperly as a defendant, the plaintiff after a decree in his favor may be allowed to amend his bill by striking out the

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union as a defendant and inserting proper allegations to bind the members of the union as parties defendant, if these members would suffer no damage from the bill being so amended at that time. *Pickett* v. *Walsh*, 572.

Conduct of Hearing.

9. In a suit in equity the order of procedure is entirely within the discretion of the trial judge, and there is nothing erroneous in hearing a motion that a master who has filed a report be ordered to report certain portions of the evidence and a motion to recommit the master's report with directions to report upon certain matters specified in the motion at the same time that a motion to confirm the master's report is heard. *Eddy* v. *Fogg*, 543.

It is within discretion of judge hearing case to allow or deny motion for appointment of commissioner to take and report evidence under Chancery Rule 35, see *post*, 10.

Commissioner to report Evidence.

10. In a suit in equity the allowance or denial of a motion for the appointment under Chancery Rule 35 of a commissioner to take and report the evidence is within the discretion of the judge hearing the case. *Manning* v. *Mulrey*, 547.

Hearings before Master.

11. An exception to the admission of evidence by a master cannot be sustained, although the evidence was admitted erroneously, if its admission has been made immaterial by the fact that neither the findings of the master nor those of the judge who heard the case were affected by it. *New York Bank Note Co.* v. *Kidder Press Manuf. Co.* 391.

12. After a master has made a draft report and submitted it to the counsel for the parties, it is within his discretion to determine how far if at all he will reopen the hearing and admit further evidence offered by either party after hearing their objections and before finally settling his report. *Ibid.*

13. When by an order of court in a suit in equity the case has been recommitted to a master to report further on certain points named in the order, a motion that the whole case be reopened for the introduction of further evidence must be addressed to the court and not to the master, and the denial of such a motion by the master is not a matter of exception to his report. *Taber* v. *Breck*, 355.

Master's Report.

14. Where a master is not required to report the evidence on which his findings of fact are based and does not report it, a finding by him that certain oral contracts alleged by the plaintiff were not proved is final. *Taber* v. *Breck*, 355.

15. Where in a suit in equity the case is referred to a master under an order of court which does not require a report of the evidence but only of such facts and questions of law as either party may request, and the master makes a full report setting forth the facts on which his rulings of law are

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based, he is not obliged to report the evidence on which his conclusions of fact were reached. *Taber* v. *Breck*, 355.

16. Where in a suit in equity a master is not required by the order of reference to report the evidence on which his findings of fact are based and does not report it, a finding by him, upon a claim by the plaintiff for compensation for services alleged to have been rendered by the plaintiff to a firm of which he had been a member, that the plaintiff after a certain date was acting as a member of the firm and not as an employee and that his employment had ceased at a previous date, is final. *Ibid.*

17. Where an order referring a case to a master does not require him to report the evidence and he does not report it, exceptions to his report which depend on a different view of the testimony from that taken by the master or which are based on the ground that some of his findings are not supported by sufficient proof cannot be considered. *New York Bank Note Co.* v. *Kidder Press Manuf. Co.* 391.

Where evidence is not reported, findings of fact by master cannot be revised unless in themselves inconsistent, see *post*, 23.

It is generally within discretion of trial judge to determine whether master's report shall be recommitted and master ordered to report certain evidence or make findings on certain specified matters, see *post*, 21, 22.

Decree.

On appeal from final decree in favor of plaintiff it was ordered that on bill being amended in certain manner as to parties within sixty days decree might be modified in certain particulars and, being so modified, should be affirmed; otherwise, it should be reversed, see *ante*, 7.

Appeal.

18. On an appeal in equity where the testimony is largely oral and is conflicting, the findings of the trial judge are to stand unless they appear to be clearly wrong. *Pels & Co.* v. *Millen*, 13.

19. On an appeal from a decree in equity where substantially all of the evidence was oral the findings of the judge who heard the case will not be disturbed unless plainly wrong. *Teasdale* v. *Newell & Snowling Construction Co.* 440.

20. On an appeal from a decree dismissing a bill in equity which does not state the ground of the decision, the burden is on the plaintiff to show that on the facts which appear a decree in his favor was necessary. *Ibid.*

21. The denial of a motion to recommit a master's report with directions to report upon certain matters specified in the motion is generally within the discretion of the trial judge and will not be revised unless erroneous as matter of law. *Eddy* v. *Fogg*, 543.

22. The denial of a motion, made after the filing of a master's report, that the master be ordered to report certain portions of the evidence, is generally within the discretion of the trial judge and will not be revised unless erroneous as matter of law. *Ibid.*

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28. Where the evidence is not reported the findings of a master on matters of fact cannot be revised, and on an appeal from a decree confirming the report the only question open is whether there is anything in the facts found by the master which requires a different conclusion from that expressed by the decree. *Eddy* v. *Fogg*, 543.

24. On an appeal from a decree in equity where all the evidence is reported without any findings of fact the decree appealed from may be reversed if this court upon consideration of the evidence reaches a conclusion of fact different from that reached by the judge who made the decree. *Poland* v. *Beal*, 559.

Certain findings of fact by master in his report in suit in equity where order of reference did not require him to report evidence on which findings of fact were based held to be final, see *ante*, 14–16.

On appeal from final decree in favor of plaintiff it was ordered that on bill being amended in certain manner as to parties within sixty days decree might be modified in certain particulars and, being so modified, should be affirmed; otherwise, it should be revised, see *ante*, 7.

Election of Remedy.

One who was member of partnership and in its employ cannot at same time maintain suit in equity to enforce specific performance of contract of copartner to purchase his interest at such time as he chose to leave firm's employ he having chosen to leave and so notified copartner, and also another suit for accounting and for share of profits accruing to interest he had offered to copartner under contract after he had offered it, see PARTNERSHIP, 1.

Rules of Court.

Appointment of commissioner to take and report evidence under Chancery Rule 35 is within discretion of judge hearing case, see *ante*, 10.

ESTOPPEL.

Estoppel of plaintiff in suits in equity, see EQUITY JURISDICTION, 3–5.

Compliance with terms of condition imposed by its grant of location from board of aldermen of city does not estop street railway company from contesting legality of condition, see STREET RAILWAY, 1.

Public service corporation not estopped from maintaining petition under R. L. c. 12, § 73, for abatement of tax on certain of its land by fact that it included this land in list of taxable property returned by it to assessors, see TAX, 11.

Foreign corporation which sells printing press with restrictive agreement in writing as to sale to other customers for same purpose and receives and retains price paid for press and agreement cannot repudiate agreement as being in excess of corporate powers, see CORPORATION, 3.

Whether fraternal beneficiary corporation which has declared member expelled under its by-laws can, in defence to action on certificate, set up failure of member to pay assessments due after such attempted expulsion, although it was ineffectual, *quaere*, see INSURANCE, 6.

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Estoppel of patentee of his own invention to deny validity of patent as against his own assignee does not operate to prevent him, in suit for infringement brought against him by assignee, from showing previous state of art to which invention relates as bearing upon construction and scope of patent in order to show alleged acts not violations, see PATENT, 2.

Fact that corporation, petitioning to intervene in suit in equity in this Commonwealth, has been for many years engaged in litigation in another State founded on contention contrary to that alleged as basis of petition to intervene, coupled with fact that granting of petition would delay doing of justice between parties already before court, is sufficient ground for refusal of petition, see EQUITY JURISDICTION, 3.

Lessee who has signed agreement in writing extending period of lease which contains provision giving lessor right to terminate it, which agreement provides for continuance of lease on same terms, cannot enjoin lessor from terminating lease on ground that he had made oral agreement before agreement in writing that lessee should remain throughout whole term and lessee had relying on oral agreement gone to great expense for improvements, see LANDLORD AND TENANT, 4.

Where at hearing of motion to dismiss reference for arbitrament and award which though "allowed" by court is void because not in conformity with R. L. c. 194, party makes requests for rulings that reference and award are valid under statute, he cannot take ground afterwards that reference although void under statute is valid as reference for assessment of damages by order of court, see PRACTICE, CIVIL, 8.

Owner of house which had been quarantined because of smallpox therein and later had been taken as smallpox hospital by board of health without issuance of warrant under Pub. Sts. c. 80, § 43, who afterward executed written lease to board for a term and, at expiration of term, permitted further occupation and received increased rental, cannot maintain action of tort against members of board, see BOARD OF HEALTH, 8.

EVANGELICAL BAPTIST BENEVOLENT AND MISSIONARY SOCIETY.

No exemption from taxation of Tremont Temple property of Evangelical Baptist Benevolent and Missionary Society beyond value of $350,000, under provisions of St. 1857, c. 154, § 2, see TAX, 14.

EVIDENCE.

Admissions.

Making of repairs by landlord at request of tenant is not admission of obligation to do so, see LANDLORD AND TENANT, 6.

Concession of counsel in argument before full court not admission which will bind client as evidence at new trial of case, see PRACTICE, CIVIL, 16.

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Best and Secondary.

1. A party to a lease which was executed in duplicate cannot be allowed to prove the contents of the lease by oral testimony merely on showing that his own original of the lease is lost, if he does not show that he has made any effort to procure the other original and he has not called the other party to the lease as a witness although that party is living in the city where the case is tried. *Peaks* v. *Cobb*, 196.

Circumstantial.

Will invalid because procured by undue influence, proved by circumstantial evidence, see WILL, 1, 2.

Action by traveller on street against company operating electric elevated railway for injuries alleged to have been caused by particle of metal falling from contact shoe of train passing overhead maintained on circumstantial evidence, see NEGLIGENCE, 41–45.

Opinion: Experts.

2. At the trial of a petition for the registration of the title to certain land, a conveyancer who has examined the title to the land in question cannot be asked by the respondent whether or not in his opinion the petitioner can be said to have a good title to all the land included in the petition, or whether his record title is good only so far as it relates to the share or portion which belonged originally to a certain person, the question apparently calling for the opinion of the witness on questions of law as well as on incompetent questions of fact. *Luce* v. *Parsons*, 8.

Declarations of Deceased Persons.

3. A declaration of a deceased person otherwise admissible under R. L. c. 175, § 66, is not to be excluded because in the form of a statement in writing signed by the declarant. *Hall* v. *Reinherz*, 52.

4. A declaration of a deceased person otherwise admissible under St. 1898, c. 535, now R. L. c. 175, § 66, is not to be excluded because it was made before the passage of that statute. *Ibid.*

5. On the question, whether the possession of a deceased predecessor in title of one claiming certain land was adverse, the person claiming the land may put in evidence, under R. L. c. 175, § 66, the declarations of his deceased predecessor as to his occupation of the land, and his declarations made on the land in pointing out the boundaries claimed by him, the last also being competent at common law. *Luce* v. *Parsons*, 8.

R. L. c. 175, § 66, with regard to admission in evidence of declarations of deceased persons, is remedial in its nature and should be construed liberally, see STATUTE, 2.

Declarations concerning Boundaries.

Declarations of deceased predecessor in title made on land in pointing out boundaries claimed by him are competent evidence to prove adverse possession of predecessor, see *ante*, 5.

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Of Experiments.

6. Whether evidence of experiments shall be admitted at a trial must be left largely to the discretion of the presiding judge, the exercise of which will not be interfered with unless it appears clearly to be wrong. *Dow* v. *Bulfinch*, 281.

7. In an action by the tenant of a tenement in a building against the owner of the building, for alienation of the affection of the plaintiff's wife by debauching and carnally knowing her, a woman who lived in a tenement above that of the plaintiff testified that when on her knees dusting around the heaters in the room over the plaintiff's bedroom, where there was a board loose and a large opening at the steam pipes and the partition was thin, she heard in the room below the plaintiff's wife and the defendant use terms of endearment toward each other and heard a noise "either like patting or kissing." Another witness who occupied the tenement adjoining that of the plaintiff on the same floor, testified that a number of times when in a bathroom separated by a partition from the bathroom of the plaintiff's tenement she heard the plaintiff's wife and the defendant in the bathroom of the plaintiff's tenement. The defendant called witnesses who after this testimony was given, and eight years after the occurrences to which the witnesses had testified, had made experiments for the purpose of ascertaining whether or not sounds and conversations in the room below, formerly occupied by the plaintiff and his wife, could be heard in the rooms above, as testified to by the first witness, and whether or not voices in the bathroom of the plaintiff's tenement could be heard in the tenement occupied by the other witness. The judge excluded evidence of the experiments, but said that he would allow the defendant to show how the floors were constructed and the space between the ceiling of one room and the floor above it, and any details he wished to go into. *Held*, that the court could not say that the exclusion of the evidence of the experiments by the judge was clearly wrong, and therefore that this exercise of his discretion would not be interfered with. *Ibid.*

Extrinsic affecting Writings.

8. In an action for alleged breach of a contract in writing to hire a certain hall from the plaintiff for Saturday nights from October 10, 1903, to June 1, 1904, inclusive, it appeared that the defendant signed the following agreement in writing: "September 25, 1903. I do hereby agree to hire Armory Hall for Saturday nights commencing October 10th, to run socials from 8 to 11.30 and conduct same in satisfactory manner according to law, etc. I hereby place a deposit of $10 to bind the bargain and agree to deposit $50 the 15th day of October. Said $50 to remain as a deposit on the hall until June 1, 1904. Price of hall to be $15 each night including the check room. Payable balance ($5) October 10th and $15 each Saturday night thereafter. If necessary, to hire an officer at my expense." The plaintiff was allowed to testify, against the objection of the defendant, that when the defendant signed the agreement the plaintiff told him orally that he would let the hall to him for the season and that

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the defendant stated that he wanted to take the hall for the season, and was allowed to testify further that the season for the letting of such halls lasted until the end of May. *Held*, that the evidence was admitted properly to explain the ambiguous terms of the contract. *Buffington* v. *McNally*, 198.

Agreement in writing made before expiration of lease extending its period upon same terms held free from ambiguity, and evidence of oral agreement made before agreement in writing with different terms held rightly excluded, see LANDLORD AND TENANT, 3.

Effect on contract in writing for sale of cement to be delivered by shipments which mentions no time of payment, of conduct of parties in making and receiving payments thirty days after each shipment, and of "usual custom" of cement trade at place of delivery to make such payments, see CONTRACT, 3–5.

Lease by owner of house to board of health after house was quarantined because of case of smallpox therein, occupation of house as smallpox hospital, receipt of rent by owner and later extension of lease for same purpose precludes action of tort for unlawful occupation although board issued no warrant under Pub. Sts. c. 80, § 43, and evidence that owner did not believe or realize that in executing lease she was signing away rights to recover damages for such occupation held rightly excluded, see BOARD OF HEALTH, 3.

Proof of Foreign Law.

Where law of another State becomes material in action in this Commonwealth, in absence of evidence thereof, it will be presumed to be same as law of this Commonwealth, see BILLS AND NOTES, 2.

Of Title by Adverse Possession.

In proving title by adverse possession one may show amount paid for land by predecessor in title, various acts of ownership, and declarations concerning boundaries, but cannot ask conveyancer for opinion on questions of law and incompetent questions of fact, see ADVERSE POSSESSION, 2; *ante*, 2, 5.

Presumptions and Burden of Proof.

9. In an action against a town on promissory notes purporting to be signed in approval by the selectmen of the defendant, which were negotiated fraudulently by a defaulting treasurer of the town who then was in good standing and which came into the hands of the plaintiff as a *bona fide* purchaser, where the defence is that the signatures of the selectmen were forged by the treasurer, the burden is on the plaintiff to show by a fair preponderance of the evidence, with all reasonable inferences to be drawn from it, that the notes sued upon are genuine, but he is not bound to exclude the possibility that they were forged. *Bass* v. *Wellesley*, 526.

Where law of another State becomes material in action in this Commonwealth, in absence of evidence thereof, it will be presumed to be same as law of this Commonwealth, see BILLS AND NOTES, 2.

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Defendant in action under R. L. c. 106, § 71, by workman injured by falling on icy plank walk, part of ways, works and machinery of defendant, if he relies on defence under § 77, that plaintiff knew defect but did not notify him, must sustain burden of establishing such defence affirmatively, see NEGLIGENCE, 18.

Traveller on street injured by particle of metal alleged to have fallen from elevated structure as train operated by electric third rail equipment passed overhead, at trial of action against company operating railway, having introduced evidence tending to show that particle came from contact shoe of train, need not exclude possibility of accident having occurred in some other way, although no one saw whence particle came, if he satisfies jury by fair preponderance of evidence that his contention is right, see NEGLIGENCE, 42.

Relevancy and Materiality.

10. In an action by the tenant of a tenement in a building against the owner of the building for alienation of the affection of the plaintiff's wife by debauching and carnally knowing her, the testimony of a woman who lived in the tenement above that of the plaintiff that on one occasion just after she had heard the defendant's voice in the plaintiff's tenement, she heard some one come out of that tenement and go downstairs to one of the entrances of the building as the plaintiff was coming up from a different entrance of the building, is admissible and its weight is for the jury. *Dow* v. *Bulfinch*, 281.

11. In an action by the tenant of a tenement in a building against the owner of the building for alienation of the affection of the plaintiff's wife by debauching and carnally knowing her, there was evidence tending to show, among other things, that, when the plaintiff was not present the defendant was accustomed to visit the plaintiff's tenement two or three times a week in the forenoon and once or twice a week in the afternoon, that the visits in the forenoon lasted from fifteen minutes to an hour and those in the afternoon from fifteen minutes to all the afternoon, and that as a rule after the defendant entered the tenement the door was locked. Against the exception of the defendant, the plaintiff's mother was allowed to testify that upon one occasion she found the door of the plaintiff's tenement locked with the key on the inside, and "rattled the door very loudly" and heard voices inside, and that one was the voice of a man. *Held*, that although this testimony standing by itself might have been of little, if any, weight, the jury properly might consider it in connection with the other testimony. *Ibid.*

Possession outside Commonwealth of goods stolen in Commonwealth competent in connection with other evidence to show that defendant indicted for receiving stolen goods received them in this Commonwealth knowing them to have been stolen, see RECEIVING STOLEN GOODS.

Fact that agent in bringing action to enforce written agreement for hiring hall made by him for undisclosed principal describes himself in writ as agent does not make admissible evidence offered by defendant of undisclosed agency, see AGENCY, 5.

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Waiver or abandonment of rule of street railway company that persons riding on front platform of car did so at own risk cannot be established by proof that conductor collected fare of plaintiff, only passenger there, and that neither he nor motorman said anything to plaintiff about rule, nor by statement of plaintiff at trial "I knew that the sign was a dead letter," nor by fact that passengers often rode there and their fares were collected, see NEGLIGENCE, 28, 29.

EXECUTOR AND ADMINISTRATOR.

Insolvent Estates.

Administrator of insolvent estate of deceased trustee who wrongfully pledged trust property to bank cannot be adjudged trustee unless proceeds of pledge can be traced and identified, nor can he be compelled to use general assets of estate to pay debt to bank in full and thus release property pledged, see TRUST, 6–8.

Where executrix of will of one who while living was plaintiff in interest in action brought by another as holder of negotiable promissory note admits solvency of estate to be doubtful but does not represent it insolvent in Probate Court and defendant after bringing action has acquired in good faith certain unmatured promissory notes of testator which mature before testator's death, defendant cannot before lapse of year from filing of executrix's bond prove notes as equitable defence under R. L. c. 173, § 28, although he might have done so had estate been declared insolvent in Probate Court, see PRACTICE, CIVIL, 12.

Widow's Allowance.

1. A petition unher R. L. c. 140, § 2, seasonably filed, for an allowance to the widow of a testator may be granted although the previous payment of debts by the executors of his will before the expiration of a year from the time of their appointment has exhausted the estate and the granting of the petition will render it insolvent. *Taylor* v. *Whitcomb*, 555.
2. If an executor or administrator before the expiration of a year from the time of his appointment pays in full debts of his testator or intestate that are not preferred, thus exhausting the personal property of the estate so as to leave nothing in his hands with which to provide for an allowance to the widow under R. L. c. 140, § 2, and such an allowance afterwards is ordered by the Probate Court, such previous payments in full may be disallowed in his account. *Ibid.*

Sale of Real Estate.

3. Where it is necessary for an executor or administrator to sell real estate to pay debts and charges of administration a mortgage on a part of the real estate securing a note barred by the special statute of limitations is not a debt of the estate to be paid by the executor or administrator, but is an incumbrance upon the real estate subject to which the property will be sold if the executor or administrator sells the mortgaged portion of the real estate. *Robinson* v. *Cogswell*, 79.

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4. In a suit in equity by an heir at law of an intestate to set aside a conveyance of real estate made by the administrator of the estate of the intestate through a third person to himself and to recover the plaintiff's share in the real estate thus conveyed, there was evidence that the administrator represented the estate to be insolvent and was licensed to sell the real estate for payment of debts, that by previous arrangement he sold and conveyed the real estate for the nominal sum of $500 to the third person who as part of the same transaction conveyed it to the administrator in his own right for the same nominal price, that no money passed in the transaction, that the administrator filed a first and final account in which he charged himself with $500 as the proceeds of the real estate, that it was inventoried at $2,700, and he credited himself with payments and charges to the amount of $1,245.44, stating a balance due him of $700.44, that after due notice the account was allowed by a decree of the Probate Court more than twenty-two years before the filing of the plaintiff's bill, that the plaintiff was the niece of the administrator and her relations to him were such as to lead her to repose confidence in him and refrain from inquiry, that she had no more than constructive notice of the allowance of the administrator's account and did not know that the real estate had been conveyed to him until his death about one year and two months before the filing of the bill, supposing that he had had charge of the real estate as administrator of the estate of the intestate who also was her uncle, having been the brother of the administrator. The judge who heard the case upon oral testimony made a decree for the plaintiff, and the defendants, who claimed the real estate as devisees under the will of the administrator, appealed. *Held*, that the evidence warranted a finding that the sale by the administrator to himself was in fraud of the plaintiff's rights and therefore was void; that there could have been found to be actual fraud on the part of the administrator, and that the defendants could not be permitted to charge the plaintiff for sums expended by their testator in the payment of taxes or otherwise in the preservation of the real estate in question, these expenditures having been made in furtherance of his fraud; *also*, that the evidence warranted a finding that the plaintiff was not guilty of laches; and that the decree should be affirmed. *Manning* v. *Mulrey*, 547.

5. On a bill in equity by an executor for instructions as to which of the parcels of real estate of the testator he shall sell first to pay debts and charges of administration and which parcel he shall sell next if another sale becomes necessary, all the parties interested joining in the prayer for instructions, it was *held*, that, although under R. L. c. 146, §§ 6–8, the power to authorize such a sale is in the Probate Court and this court cannot direct or control the action of the Probate Court in the matter, this court will instruct the executor how he should make his application to the Probate Court, leaving that court to deal with it when made. *Robinson* v. *Cogswell*, 79.

For instructions by this court on such a bill in equity and under such circumstances, see EQUITY JURISDICTION, 12.

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Statute of Limitations.

Suit under R. L. c. 141, § 10, by creditor against executors brought after expiration of two years' statutory period of limitations held on facts maintainable, see EQUITY JURISDICTION, 17.

Contribution.

Bequest of proceeds that might be recovered in certain action is specific legacy, and under R. L. c. 135, §§ 26, 27, proceeds obtained by executor are to be paid legatee in full without being diminished by contribution for payment of debts if property generally devised is sufficient for payment of debts, see DEVISE AND LEGACY, 5.

For devise of real estate liable to contribution because general and not specific, see DEVISE AND LEGACY, 6.

Refunding of Unauthorized Payments.

Liability of administrator to repay to next of kin money paid by him to one of two attorneys in fact appointed by them with bare authority to receive money without having obtained authority for such payment from other attorney, see AGENCY, 1, 2.

Payments of debts in full by executor or administrator, before expiration of one year from time of his appointment, exhausting personal property of estate and leaving nothing to provide for widow's allowance, if such allowance afterwards is ordered, may be disallowed in his account, see *ante*, 2.

FALSE REPRESENTATIONS.

Voluntary payment by one party to contract to other party made in reliance upon soundness of other party's claim based on his assertion as to effect of contract in law and fact cannot be recovered back on its appearing that claim of person receiving money was unsound, see DECEIT.

FRATERNAL BENEFICIARY CORPORATION.

1. The members of a fraternal beneficiary corporation subject to the provisions of R. L. c. 119 are bound by the by-laws of the corporation regularly made or amended, even without an express agreement on the subject such as existed in this case. *Reynolds* v. *Royal Arcanum*, 150.

2. A fraternal beneficiary corporation which is subject to the provisions of R. L. c. 119 by an amendment of its by-laws may require the assessments paid by its members for death benefits to be increased when a member reaches a certain age instead of remaining at the rate determined by the age of the member when he received his certificate. *Ibid.*

3. By the prescribed form of application for membership of a certain fraternal beneficiary corporation which was subject to the provisions of R. L. c. 119 every member agreed to "conform to and abide by the constitution, laws, rules and usages of the said council and order now in force, or which

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may hereafter be adopted by the same." The benefit certificates promised payment out of the widows and orphans' benefit fund only on condition that the member "complies in the future with the laws, rules and regulations now governing the said council and fund, or that may hereafter be enacted by the supreme council to govern the said council and fund." Under the by-laws then existing the assessments of the members from which the death benefits were derived were determined by the age of each member when he received his certificate and thereafter remained unchanged during the life of the member. Finding that the payments for death benefits exceeded the receipts from the assessments, the supreme council caused mortality tables to be prepared and employed competent actuaries to devise a method, through a change of by-laws, which should enable the corporation to meet its obligations to its members. Following the recommendations of the actuaries the supreme council adopted an amendment of the by-laws by which a member after attaining the age of sixty-five years should pay assessments at the rate prescribed for an assessment at that age, giving the member an option, to pay a uniform special rate computed as the equivalent of this requirement, or to pay a step rate increasing annually from the time of receiving his certificate to and through the age of sixty-five years and then becoming constant, or to pay the constant rate which was in force before the change in the by-laws with the full amount of the benefit up to the age of sixty years, subject thereafter to an annual reduction of the amount of the benefit until the age of seventy-five years when the benefit would be reduced to one half of its original amount and thereafter would remain unchanged. *Held*, that the amendment of the by-laws was binding on the members. *Reynolds* v. *Royal Arcanum*, 150.

Woman entering family of member of fraternal beneficiary corporation on his promise to her sister, upon marriage, that he and his wife and her sisters should "all live together," and continuing there after wife's death under same arrangement held proper beneficiary under certificate of fraternal insurance, see INSURANCE, 2, 3.

Rule of common law that a misrepresentation, not a warranty, in application to fraternal beneficiary corporation for membership and insurance does not avoid certificates issued on application unless misrepresentation was made with intent to deceive or matter misrepresented increased risk of loss applied to facts, see INSURANCE, 7–9.

Where by-law of fraternal beneficiary corporation provides for expulsion of member in case of false statements in application for membership after notice to accused and opportunity to be heard in defence, expulsion without such notice or opportunity is ineffectual to avoid liability under terms of certificate, see INSURANCE, 10.

Whether corporation can set up in defence to action on certificate failure by insured to pay assessments after such attempted expulsion, *quaere*, see INSURANCE, 6.

FRAUD.

Actual fraud of administrator in sale to himself of intestate's real estate, see EXECUTOR AND ADMINISTRATOR, 4.

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Fraud (*continued*).

Fraudulent pledging of trustee's property by trustee, and attempt to follow proceeds in hands of administrator of deceased trustee's insolvent estate, see TRUST, 6–8.

Shop girl over eighteen years of age who by falsely representing herself to be student under eighteen years of age procures ticket and rides on railroad is trespasser and does not have rights as passenger, see NEGLIGENCE, 46; CARRIER, 1, 2.

Rights of pledgee of partnership property fraudulently pledged by one partner to bank to secure individual debt, bank having no notice actual or constructive of fraud, to enforce terms of pledge against receiver of partnership property, partnership and fraudulent partner having become insolvent, see PLEDGE, 2, 3.

Selectmen's failure to state in warrant for town meeting an intended vote by them to purchase a water company's plant and failure to disclose such vote after it was passed to voters before meeting is not evidence of corruption to support charge of conspiracy unless there is proof to connect it with fraudulent conduct or unlawful purpose, see CONSPIRACY, 3.

FRAUDS, STATUTE OF.

An oral promise by one who is a stockholder in a corporation and is engaged in its business as a salesman, and who is about to acquire the business of the corporation, to pay the debt of a creditor of the corporation if he will refrain from attaching the property of the corporation and putting a keeper in its place of business, is a special promise to answer for the debt of another within R. L. c. 74, § 1, cl. 2, on which no action can be sustained without a memorandum in writing signed by or in behalf of the party to be charged. *Carleton* v. *Floyd, Rounds & Co.* 204.

GIFT.

To pass the title to property by gift there must be a delivery and an acceptance actual or constructive. *Bailey* v. *New Bedford Institution for Savings*, 564.

Deposit in savings bank "in trust for E.," the depositor's nephew, held to belong to estate of depositor after her death, facts showing no delivery or acceptance of gift during depositor's lifetime, nor anything tantamount thereto, see TRUST, 5.

GOOD WILL.

Where one sold good will to partnership composed of two persons and agreed not to carry on business for certain period within certain city unless purchasers should cease within that period to carry on business within that city, fact that one of purchasing partners sells to other who continues in business does not release original seller from agreement, see EQUITY JURISDICTION, 9.

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GRADE CROSSING ACTS.

Quaere, whether act of Legislature giving damages for property injured by removal of railroad in abolition of grade crossing, passed after judgment in accordance with decision of this court denying a petitioner such rights would be constitutional as to such petition, see CONSTITUTIONAL LAW.

GUARANTY.

If lease is signed but not sealed by lessee and guarantors, and afterwards seals are affixed by person without authority and lease is sent to lessor who executes it without knowledge of these facts, lessor can maintain action on instrument against guarantors as though it were unsealed, see ALTERATION OF INSTRUMENTS.

Declaration in contract against guarantors of lease who signed guaranty providing that they should be severally and equally but not jointly liable, properly consists of different counts under R. L. c. 173, § 3, see PLEADING, CIVIL.

HAVERHILL.

Construction of ordinance and orders of city of Haverhill providing for sewer running in part through private land not street or way, and for assessments therefor, as coming within provisions of R. L. c. 49, §§ 3, 5, see TAX, 4–7.

HIGHWAY.

Negligence in use of highway, see NEGLIGENCE, 31–39, 41–45, 47.

Whether ice and snow on sidewalk is nuisance, see NUISANCE, 4–6.

Acts of successive city councils in laying out of street, see WAY, 1–3.

Grant of location to street railway company for its tracks in highway subject to conditions, see STREET RAILWAY, 1–5.

Jurisdiction of Land Court over questions affecting highway bordering on land of one petitioning for registration, see LAND COURT, 1.

HOPKINTON.

As to exemption from taxation of certain lands in Hopkinton taken by Milford Water Company, a public service corporation, for supplying of inhabitants of Milford with water, see TAX, 12, 13.

HUSBAND AND WIFE.

1. A widow is not entitled to dower in a vested remainder. *Gray* v. *Whittemore*, 367.
2. A remark in Leonard *v.* Leonard, 181 Mass. 458, 461, in regard to the deed of conveyance in the case of Brownell *v.* Briggs, 173 Mass. 529, being "left in the grantor's possession" explained after inspection of the record in the last named case. *Seaman* v. *Harmon*, 5.

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Husband and Wife (*continued*).

Doctrine of instantaneous seisin as applied to dower, see DOWER, 4.

Wife has no dower in real estate in which husband had merely equitable and not legal estate at any time during coverture, see DOWER, 2, 3.

Widow of one dying intestate who during coverture had procured real estate to be conveyed to his sister to hold in trust for himself, he having the entire beneficial interest therein and power of appointment by will, has no dower rights therein, see DOWER, 3.

Husband, under Pub. Sts. c. 124, § 1, is heir at law of wife and as such is entitled to share of trust estate directed by will of his wife to be transferred to her heirs at law unless contrary intention appears in will, see DEVISE AND LEGACY, 2–4.

ICE AND SNOW.

Duties and liabilities of one owning or controlling premises adjoining sidewalk which is part of highway of city as to clearing ice and snow from sidewalk and scattering ashes thereon, see NUISANCE, 4–6.

Action by employee against employer for negligently allowing ice and snow to accumulate on plank walk leading to privy used by employees, see NEGLIGENCE, 13–18.

IMPOTENCY.

What constitutes impotency in a woman, see MARRIAGE AND DIVORCE, 1.

INSOLVENCY.

Right of pledgee of partnership property wrongfully pledged by one partner to bank to secure individual debt, bank having no notice actual or constructive of fraud, to enforce terms of pledge against receiver of partnership's property, partnership and fraudulent partner having become insolvent, see PLEDGE, 2, 3.

Administrator of insolvent estate of deceased trustee who had wrongfully pledged trust property to bank cannot be adjudged trustee unless proceeds of pledge can be traced and identified, nor can he be compelled to use general assets of estate to pay debt to bank in full and thus release property pledged, see TRUST, 6–8.

INSURANCE.

Life.

Application.

1. Under R. L. c. 118, § 73, an application for life insurance, of which a copy is attached to the policy issued upon it and which is referred to therein, forms part of the contract of insurance although neither the original application nor the copy of it has printed upon it in large bold-faced type or otherwise the words "Under the laws of Massachusetts, each applicant for a policy of insurance to be issued hereunder is entitled to

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be furnished with a copy of this application attached to any policy issued thereon." *Moore* v. *Northwestern Ins. Co.* 468.

False statements in application for insurance as defence to action against insurer on policy or certificate, see *post*, 7–10.

Attempted expulsion from fraternal beneficiary corporation for alleged false statements in application for membership, see *post*, 10.

Beneficiary.

2. Under St. 1882, c. 195, § 2, now incorporated in R. L. c. 119, § 6, a person may be found to be dependent on a member of a fraternal beneficiary corporation, so as properly to be named as a beneficiary of a death benefit, if the assistance rendered by the member to such person was not trivial or casual or wholly charitable, but was substantial and material, and if the obligation to furnish it, although it might not be enforceable at law, rested upon moral and equitable grounds and the assistance was furnished in recognition of that obligation. *Wilber* v. *New England Order of Protection*, 477.

3. Under St. 1882, c. 195, § 2, now incorporated in R. L. c. 119, § 6, a woman named in a certificate of a fraternal beneficiary corporation as a beneficiary to whom a death benefit is to be paid may be found to have been dependent upon the member within the meaning of the statute where she was the sister of the deceased wife of the member and came with another sister, who was not strong and could not work, to live with the member and his wife upon his agreement that if the sister that became his wife would marry him the other sisters should go with her and always have a home as long as he lived, and where after the death of his wife the member said that they would go on "giving in together and keeping house" just as they did before and that if the sisters "would keep on keeping house for him" they might go on and live in the same way they had been living, and where in pursuance of this arrangement the home was kept up as before until the death of the member, the sister who could not work acting as treasurer, the member contributing from $12 to $15 a week and the person named as beneficiary contributing $4 a week and sometimes more. *Ibid.*

Construction.

4. A policy of life insurance incorporated by reference the following agreement contained in the application for insurance signed by the insured: "And I do further agree that if within two years from the date of said policy I shall pass south of the Tropic of Cancer, or . . . shall within one year from the date of said policy whether sane or insane die by my own hand, then and in every such case any policy issued on this application shall be null and void." *Held*, that the words "sane or insane" covered every case of suicide, and that there could be no recovery on the policy where the insured killed himself within the year although his act "was the result of a blind and irresistible impulse over which the will of the deceased had no control and was not an act of volition," and "he did not know or understand the nature and consequences of the act." *Moore* v. *Northwestern Ins. Co.* 468.

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Forfeiture by non-payment of assessments.

5. In an action against a fraternal beneficiary corporation by the beneficiary named in one of its certificates, if the defendant relies on the defence that the insured had forfeited his membership by a failure to pay the regular monthly assessments, this defence must be pleaded specially and is not open to the defendant under an answer which as to this issue contains only a general denial. *Kidder* v. *Order of the Golden Cross*, 326.
6. In an action against a fraternal beneficiary corporation by the beneficiary named in one of its certificates, *whether* the defendant can set up the defence that the insured had forfeited his membership by a failure to pay or tender the regular monthly assessments, if the failure to pay or tender the assessments was after the defendant had declared that the membership of the assured was terminated and had ordered its subordinate commandery not to receive dues or assessments from the insured or from any person acting in his behalf, *quaere*. *Ibid.*

Avoidance because of false statements in application.

7. A misrepresentation, which is not a warranty, in an application to a fraternal beneficiary corporation for membership and insurance, unless made with actual intent to deceive or unless the matter misrepresented increased the risk of loss, does not avoid a certificate issued on the application. *Ibid.*
8. Although by R. L. c. 119, § 22, the provision of R. L. c. 118, § 21, that no misrepresentation or warranty by the assured shall defeat a policy of insurance unless "made with actual intent to deceive or unless the matter misrepresented or made a warranty increased the risk of loss," does not apply to fraternal beneficiary corporations, that provision, so far as it relates to misrepresentations which are not warranties, is merely declaratory of the common law. *Ibid.*
9. In an action against a fraternal beneficiary corporation by the beneficiary named in one of its certificates, the defendant contended that the certificate was void because the insured member upon whose death the benefit was payable had made misrepresentations in her application for insurance and membership. It appeared that the insured in her application had stated that she had not been treated by a physician within the past twelve months; that she never had had any protracted illness; that she was in perfect health so far as she knew or believed; that she had not been obliged to consult a physician or lose any time from her usual occupation on account of sickness at any time during the past five years; that no physician ever had given an unfavorable opinion upon her life or health; and that no material facts bearing upon her life or health had been omitted or suppressed. It further appeared that during the year preceding her application the insured had consulted a physician and had received medical advice and treatment for slight ailments which caused her to be confined to her bed for about eight or ten days, that, although she formerly had believed or suspected that a serious physical trouble existed, her family physician after an examination assured her to the contrary and she accepted and acted upon his opinion which was a correct one, that her

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occupation was that of a housewife and the evidence warranted a finding that it had not been interrupted by any long continued or severe sickness which rendered her incapable of supervision of the household. *Held*, that the incorrect answers of the insured were representations only and not warranties, that it was for the jury to find under suitable instructions whether the incorrect answers were material or intentionally false, and that unless they were intentionally false or increased the risk they were no bar to the plaintiff's recovery. *Kidder* v. *Order of the Golden Cross*, 326.

Expulsion.

10. The by-laws of a fraternal beneficiary corporation provided that any member who gained admission by reason of any false statements contained in his application for membership should on conviction be expelled, but that before such expulsion could be ordered the accused was entitled to be informed of the charges made against him and to be heard in defence. An insurance certificate had been issued to a woman upon her application, and the corporation had recognized her as a member by receiving dues and assessments from her. Thereafter, without any previous notice giving her an opportunity to be heard, in obedience to an order of the principal officer of the corporation authorized to act in its behalf, the subordinate commandery voted to return to this woman the amount previously paid by her for dues and assessments and to notify her that having gained admission through misrepresentation she was disconnected, but no tender ever was made nor notice communicated to her, because she was mortally sick and substantially unconscious at the time the vote was passed and until her death. In an action by the beneficiary named in her certificate to recover the amount of the insurance, the defendant asked for a ruling that if the defendant rescinded the contract and expelled or disconnected the insured from the order, it became her duty if she desired to continue her membership to exhaust by an appeal the remedies provided by the constitution and by-laws for reinstatement. The ruling was refused. *Held*, that the ruling was refused rightly; that if the expulsion, although declared without granting the member an opportunity to be heard, could be upheld as valid until suspended by an appeal, no effective notice of expulsion or disconnection having been given to the insured the attempted act of rescission never was perfected and there was no occasion for resorting to an appeal. *Ibid.*

Change of rate by amending by-laws after issuance of certificate.

Amendment of by-laws of fraternal beneficiary corporation changing rate of assessment for insurance purposes, see FRATERNAL BENEFICIARY CORPORATION, 1–3.

INTEREST.

Where plaintiff is entitled to damages for breach of contract he also is entitled to interest from date of breach, see DAMAGES, 3.

As to computation of interest on award of damages for taking of private property by right of eminent domain for public purpose where right under earlier statute was barred by limitation and damages could be awarded only under later statute, see DAMAGES, 2.

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JUDGMENT.

Judgment rendered on agreement of counsel in municipal court may be appealed from to Superior Court where validity of agreement may be determined, see PRACTICE, CIVIL, 19.

In actions brought by receiver of foreign banking corporation appointed in State of its incorporation to enforce stockholders' liability arising according to such State's laws after adjudication of corporate debts and exhausting of other corporate assets, judgment of court of such State of competent jurisdiction in suit to which corporation was party although individual stockholders, defendants here, were not parties, adjudging corporation insolvent, adjudicating its debts and appointing receiver is binding on stockholders in this Commonwealth, see EQUITY JURISDICTION, 11.

JURISDICTION.

Suit for infringement of patent which involves inquiry into its scope and nature is within exclusive jurisdiction of federal courts, see PATENT, 1.

R. L. c. 112, § 100, in giving jurisdiction to Supreme Judicial Court and Superior Court to review, annul, modify or amend rulings of State board or commission relative to street railways, refers to rulings of law and not to decisions or findings on questions of fact, and in such proceedings the only evidence admissible is proof of evidence that was before such board or commission, see EQUITY JURISDICTION, 15, 16.

Probate Court's jurisdiction to hear and determine petition by executor or administrator for sale of real estate to pay debts of estate is exclusive, and this court will not make orders as to such sale on bill by executor for instructions, although, where all parties interested join in prayer, it will instruct executor how to proceed before Probate Court, see EXECUTOR AND ADMINISTRATOR, 5.

LABOR UNION.

1. What is lawful for an individual may be unlawful when done by a combination of individuals. *Pickett* v. *Walsh*, 572.

2. A union of bricklayers and a union of stone masons lawfully may exclude from membership in their respective unions pointers of mortar who are not bricklayers or masons. *Ibid.*

3. The right of coercion and compulsion which a labor union lawfully may exercise is limited to strikes against persons with whom the organization has a trade dispute. *Ibid.*

4. In a suit in equity against the officers and members of a labor union to enjoin the defendants from unlawful interference with a contract between the plaintiff and the owner of a building for the doing of certain work thereon, whether the bill will be dismissed on the ground that damages in an action at law would give the plaintiff adequate compensation for the breach of contract, if that objection is taken properly, *quaere*. Here the point was not passed upon because the objection was not taken. *Ibid.*

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5. A pointer of mortar employed by the owner of a building to point the mortar on the building after the bricks and stones have been laid may maintain a suit in equity to enjoin the members of a bricklayers' union and the members of a stone masons' union from refusing to work for a contractor in laying brick or stone in the construction of the building unless the contractor will join them in compelling the owner of the building to discharge the pointer, and also to enjoin the defendants from exercising compulsion on the contractor for the same purpose by refusing to work for him in the construction of other buildings. *Pickett* v. *Walsh*, 572.

6. A strike by the members of a bricklayers' union and the members of a stone masons' union in refusing to lay bricks or stone for a contractor in the construction of a certain building unless also employed to do the pointing of the mortar after the bricks and stones have been laid, and unless other persons, who are pointers but not bricklayers or stone masons and whom the contractor prefers to employ because they do the work of pointing better and for less pay, are discharged by him, does not entitle the pointers, when discharged by the contractor by reason of the strike, to maintain a suit in equity to enjoin the acts of the members of the unions on the ground that such acts constitute an unlawful conspiracy. *Ibid.*

Unincorporated labor union cannot be made party to suit in equity to enjoin unlawful acts of its officers and members, see EQUITY PLEADING AND PRACTICE, 1.

LACHES.

Laches as to suit in equity, see EQUITY JURISDICTION, 1–3, 17; EXECUTOR AND ADMINISTRATOR, 4.

Laches as bar to petition to intervene by corporation which for many years had been engaged in litigation in another State founded on contention contrary to that which is alleged as basis of petition, see EQUITY JURISDICTION, 8.

LAND COURT.

Jurisdiction.

1. Upon a petition for the registration of a title and to have the boundary of a highway determined the Land Court has jurisdiction to determine whether the public have acquired a right of way by prescription over a strip of land between a building on the petitioner's land and the highway as originally laid out. *First National Bank of Woburn* v. *Woburn*, 220.

Land Court may discharge mortgage on petition under R. L. c. 182, § 15, on petitioner's showing record title, incumbrance by undischarged mortgage and possession for twenty years without payment upon or recognition of mortgage, see MORTGAGE.

Appeal.

2. Under R. L. c. 128, § 13, a city has the right of appeal to the Superior Court from a decree of the Land Court determining the boundary of one of its highways, upon the petition of an owner of land abutting thereon, and deciding that the public have not gained a right of way by pre-

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Land Court (*continued*).
scription over a strip of land of the petitioner adjoining the highway. Whether the attorney general as representing the public also has the right to appeal from such a decree, *quaere*. *First National Bank of Woburn* v. *Woburn*, 220.
Superior Court has power on appeal from Land Court to modify or enlarge issues framed in Land Court, although it would not be expected to frame additional or to change existing issues without good cause, see SUPERIOR COURT, 2.

LANDLORD AND TENANT.

Construction of Lease.

1. A covenant in a lease of land with the lessees and "their heirs and assigns" that at the termination of the lease the lessor or its successors will extend the lease to the lessees "or their heirs and assigns on reasonable terms for a reasonable time, or pay to them, . . . and their heirs or assigns a just and reasonable sum for such buildings and improvements as they, the said lessees may have put thereon," includes not only payment for buildings put upon the land by the lessees personally but also for those put there by a subtenant or an assignee, and the covenant being made with the lessees and their assigns runs with the land under the rule laid down in the second resolution in Spencer's case, 5 Coke, 16 a, b. *Hollywood* v. *First Parish in Brockton*, 269.
Construction of written agreement for hiring hall for socials once a week during a "season" made by agent in behalf of undisclosed principal, and agent's right to bring action thereon in his own name and to enforce contract after performance of agreement by both parties during part of term, see EVIDENCE, 8; AGENCY, 4, 5; CONTRACT, 9.
Construction of contract extending term of lease, see *post*, 3–5.

Assignment of Lease.

2. One who acquires the whole estate of a lessee of land in a portion of the land covered by the lease is an assignee and not a subtenant. *Hollywood* v. *First Parish in Brockton*, 269.

Extension of Lease.

3. An agreement in writing between a lessor and a lessee made before the expiration of the term, extending the lease for a further period of five years and stipulating that "all provisions, agreements, terms and conditions in said lease . . . shall apply to said term as extended," is free from ambiguity and cannot be varied by evidence of an oral agreement that the lessor shall not exercise a right reserved by him in the lease to terminate it by giving a certain notice and paying a stipulated amount of money. *DeFriest* v. *Bradley*, 346.
4. A lessee has no remedy in equity to enjoin his lessor from exercising a right to terminate the lease, which was given to him by its terms and has been continued by an agreement in writing extending the period of

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the lease, on the ground that before the extension took effect the lessee made improvements on the premises at a large expense with the knowledge and consent of the lessor, relying upon and induced by an oral agreement of the lessor that if the improvements were made the lease should be extended and the lessor would permit the lessee to occupy the premises during the whole of the extended term. *DeFriest* v. *Bradley*, 346.

5. If a lease for four years contains a reservation by the lessor of the right to cancel the lease by giving a certain notice and paying a stipulated amount of money, and contains no provision for renewal, and if the parties to the lease before its expiration make an agreement in writing extending the lease for a further period of five years and stipulating that "all provisions, agreements, terms and conditions in said lease . . . shall apply to said term as extended," this continues the lease for a period of nine years from its date and leaves all of its provisions in force including the lessor's right of cancellation, although before the extension took effect the lessee made improvements on the premises at a large expense with the knowledge and consent of the lessor and relying upon and induced by an oral agreement of the lessor that if the improvements were made the lease should be extended for a further term of five years and the lessor would permit the lessee to occupy the premises during the whole of the extended term. *Ibid.*

Guaranty of Lease.

If lease is signed but not sealed by lessee and guarantors, then sealed by person without authority and sent to lessor who executes it without knowledge of these facts, lessor can maintain action on instrument against guarantors as though it were unsealed, see ALTERATION OF INSTRUMENTS.

Subtenant.

One who acquires whole estate of lessee of land in portion of land covered by lease is assignee and not subtenant, see *ante*, 2.

Liability of Landlord to Tenant.

6. If a landlord makes repairs at the request of a tenant this is not an admission of his liability or obligation to make the repairs. *Dalton* v. *Gibson*, 1.

7. Where one takes a lease of certain rooms in a building, covenanting that he will keep the premises in such repair, order and condition as they are in at the commencement of the term or may be put in during its continuance, and the premises are in good condition when he takes the lease, if afterwards he is injured by the plastering of the ceiling falling upon him owing to a leak in a flat roof not included in the premises let to him, he cannot recover from the landlord for his injuries, as it is his own duty to repair the ceiling and the landlord owes him no duty to repair the roof; and the same is true if the person injured is the servant of the tenant who as against the landlord has no greater rights than his employer. *Ibid.*

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Liability of Landlord to Third Person.

8. The servant of a lessee of a part of a building who is injured on the leased premises owing to a want of repairs has no greater rights against the lessor than the lessee himself. *Dalton* v. *Gibson*, 1.

Property of Third Person on Leased Premises after Termination of Term.

Right of owner of piano delivered on written lease to one occupying premises as tenant to remove piano after termination of lease despite objection of owner of premises, see EQUITY JURISDICTION, 13.

Landlord who permits owner of piano leased by his tenant to place piano on premises by temporarily enlarging window does not convert piano if, on termination of lease of piano, he orders owner to remove piano but refuses to allow him to adopt only practicable way of doing so, see CONVERSION.

Estoppel of Landlord to deny Lessee's Estate.

Lease by owner of house to board of health after it was quarantined because of case of smallpox therein, occupation of house as smallpox hospital, receipt of rent by owner and later extension of lease for same purpose precludes action of tort for unlawful occupation although board issued no warrant under Pub. Sts. c. 80, § 43, see BOARD OF HEALTH, 3.

Proof of Lease executed in Duplicate.

Contents of lease executed in duplicate cannot be proved by oral testimony on showing that one original is lost without showing that all reasonable effort has been made to procure the other, see EVIDENCE, 1.

LEGACY.

See DEVISE AND LEGACY.

LICENSE.

No license under R. L. c. 102, § 69, is required to permit erection of stable upon land within park reservation by contractor employed by metropolitan park commissioners, if such stable is reasonably necessary for prosecution of their work and was erected by their sanction and under their vote, see BOARD OF HEALTH, 1, 2.

LIMITATIONS, STATUTE OF.

On the dissolution of a partnership the right to an accounting accrues, and a bill in equity for an accounting between the partners filed more than six years after such dissolution is barred by the statute of limitations. *Eddy* v. *Fogg*, 543.

Failure to claim compensation for private property taken by right of eminent domain for public purpose within time fixed by Legislature precludes recovery, see DAMAGES, 1.

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Suit under R. L. c. 141, § 10, by creditor against executors brought after expiration of two years' statutory period of limitations held on facts maintainable, see EQUITY JURISDICTION, 17.

Where special statute of limitations prevents debt from being one to be paid by executor or administrator, if debt is secured by mortgage on real estate of testator, it is an incumbrance subject to which real estate is sold if executor or administrator is given leave to sell to pay debts of estate, see EXECUTOR AND ADMINISTRATOR, 3.

MANDAMUS.

Veteran whom city has refused to continue to employ as laborer, employing other persons not veterans to his exclusion, need not proceed by mandamus before he gets pecuniary relief, but may proceed by action at law for breach of contract, see VETERAN, 5.

MARRIAGE AND DIVORCE.

Impotency.

1. Inability of a wife to perform the sexual marriage function without such severe pain as to cause a serious nervous condition and illness on her part, so that the husband and wife live apart because advised by a physician that sexual intercourse between them cannot be continued, the difficulty in their intercourse arising from a certain degree of variation from the normal in the sexual organs of both husband and wife, which would make no difficulty in intercourse between the husband and any other woman or between the wife and any other man, constitutes impotency which entitles the husband to a divorce under R. L. c. 152, § 1. *S*—— v. *S*——, 194.

Alimony.

2. A decree for alimony in a gross sum is a debt which may be proved against an absentee within the meaning of R. L. c. 144, § 9, and may be ordered to be paid out of the proceeds of his property in the hands of a receiver appointed under that chapter. *Purdon* v. *Blinn*, 387.

Rights in Real Estate after Divorce.

Wife who has obtained divorce on grounds of adultery has no dower rights in real estate of former husband where he at no time during coverture had legal seisin but merely an equitable title, see DOWER, 3.

MARRIED WOMAN.

See DOWER; HUSBAND AND WIFE; MARRIAGE AND DIVORCE.

MARSHALLING OF ASSETS.

On petition to marshal assets of estate of deceased person it was held that devise to three children of real estate remaining after certain specific devises, "to be divided equally between them in three equal shares," was

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general devise, and that therefore real estate thus devised must be resorted to for payment of debts before real estate specifically devised, see DEVISE AND LEGACY, 6.

Bequest of proceeds that may be recovered in certain action specific and so not liable to contribution, see DEVISE AND LEGACY, 5.

MARYLAND.

Promissory note dated and apparently made in New York, given in renewal of note held by firm doing business in Maryland, delivered in Maryland to national bank doing business in Maryland and payable there, in absence of evidence of law of New York, is governed by law as to presentment and demand as it is in Maryland and this Commonwealth, and no presentment and demand before action against maker are necessary, see BILLS AND NOTES, 2.

MASTER AND SERVANT.

See CARRIER, 1, 2; NEGLIGENCE, 8–26.

MECHANIC'S LIEN.

1. On a petition to establish a mechanic's lien, as in the case of dower, a mortgagee can take advantage of the doctrine of instantaneous seisin only where the mortgage was made to secure the purchase money or some part of it. *Libbey* v. *Tidden*, 175.
2. An architect cannot maintain a petition to establish a mechanic's lien for labor performed under an entire contract to prepare plans and specifications and supervise the erection of a building for a round sum of money, there being no lien for the work of preparing the plans and specifications. *Ibid.*
3. Where labor and materials are furnished under a contract for the construction of a building for a person who at the time of making the contract has not the title to the land on which the building is to be built but who afterwards acquires it, the lien extends as well to the labor and materials furnished before the deed was delivered as to those furnished afterwards, and in proceedings to establish the lien it does not matter whether or not the contract was an entire one for a round price. *Ibid.*
4. Where one intending to purchase certain land has made a contract for the construction of a building upon it and thereafter acquires the title to the land and makes a mortgage of it as a separate transaction for a building loan and not to secure the purchase money, the contractor for the building can establish a lien for the materials and labor furnished by him which will be good against the mortgage without showing any ratification of the contract by the owner of the land after he acquired the title to it and before he made the mortgage, no ratification being called for because the contract was his already. *Ibid.*
5. At the trial of a petition to establish a mechanic's lien, one of the respondents claimed under a mortgage made to a title company by the owner of the land at the time he acquired title to it, which was after he

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had made the contract with the petitioner under which the petitioner furnished the materials and labor for which the lien was claimed. The respondent claiming under the title company contended that the seisin of the owner of the land was instantaneous so that the petitioner's lien did not attach to the land as against the mortgage. There was evidence warranting findings, that the owner of the land wished to accomplish two things, one being to get the title to the land and the other to get a building loan to enable him to put up the building on the land for which he had made the contract with the petitioner, that the title company agreed to make the building loan but refused to lend the money to pay for the land, whereupon an individual agreed to lend the purchase money, that the following deeds were recorded simultaneously in the following order: 1, the deed to the owner, 2, his mortgage to the individual lender of the purchase money, 3, the mortgage to the title company; and that the title company did not intend to pay any of the purchase money as such, although a part of its first advance under the building loan was used to pay and discharge the mortgage given for the purchase money. A judge, sitting without a jury, found that the acquisition of the title to the land and the mortgage to the title company were separate transactions, and ordered that the lien of the petitioner be established as against the mortgage. *Held*, that the finding was warranted. *Libbey* v. *Tidden*, 175.

6. On the trial of a petition to establish a mechanic's lien, one of the respondents claimed the real estate in question under a mortgage which he contended was made and recorded before the making of the contract under which the petitioner sought to establish his lien. It appeared that three days before the purchase of the land and the making of the mortgage the prospective purchaser intending to erect a building on the land asked the petitioner, who had been furnished with the plans and specifications of the architect, for what he would do the mason work, the carpenter work and the roofing, and the plaintiff said that he would do it for $71,000, to which the prospective purchaser replied "All right, I will give you the contract," that the amounts and times of payments were not agreed upon, but it was agreed in a general way that they were to be made as the floors went on, and it also was agreed that the petitioner was to have later what was known as a "uniform contract," being the form of contract adopted and recommended for general use by the American Institute of Architects and the National Association of Builders, that the next day the petitioner drove some stakes to indicate where the excavation for the cellar was to be made, and after the purchase of the land had frequent interviews with the purchaser in regard to the building, that about three months later the petitioner sent two carpenters to the land to put up the batter boards and on six successive days in the next month laid the brick of cross walls in the cellar at an estimated cost of $700, that on the second day of the following month, a contract in writing was signed by the petitioner and the purchaser of the land, and "there was no particular reason why it was not signed before," that the contract was written upon the uniform contract blank, and provided that the petitioner should provide all materials and perform all the work mentioned in the specifications except cut stone and

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gas piping, that in addition to the terms of the oral contract dates of payment were specified, and there were provisions that the building should be finished by a certain time, that the petitioner should allow the purchaser of the land insurance money and in regard to other details. The lien sought to be established was principally for materials and labor furnished after the execution of the contract in writing. A judge, sitting without a jury, found that the instrument in writing did not in any essential particular alter the existing oral contract and was an affirmation of it and not a substitute for it, so that the materials and labor were furnished by the petitioner under a contract which was made before the making of the mortgage, and the judge ordered that the lien of the petitioner be established as against the respondent claiming under the mortgage as well as against the purchaser of the land. *Held*, that the finding of the judge as to the time when the contract was made was warranted. *Libbey* v. *Tidden*, 175.

7. If, at the trial of a petition to establish a mechanic's lien, issues are framed for the jury and the answers of the jury to certain of the issues are agreed upon by the parties, and if among those agreed upon is the issue "What amount, if anything, is due the petitioner for labor performed and materials furnished on the house on said premises under said contract," and the answer is "$917.46," this disposes of an objection by the respondent that the petitioner abandoned his contract, and if there is no other objection warrants a decree for the petitioner. *Rochford* v. *Rochford*, 231.

MEMORANDA.

Resignation of Mr. Justice Lathrop, 559.
Appointment of Mr. Justice Rugg, 559.

METROPOLITAN PARK COMMISSIONERS.

R. L. c. 102, § 69, as to licensing of stable by municipal board of health held not to apply to stable placed temporarily on land in park reservation for use of contractor employed by metropolitan park commissioners reasonably necessary for prosecution of their work and erected by their sanction and under their vote, see BOARD OF HEALTH, 1, 2.

METROPOLITAN SEWERAGE COMMISSIONERS.

One contracting with metropolitan sewerage commissioners to construct sewer in action against him for damage to plaintiff's property cannot avail himself of defence that members of commission are not liable, if such is the case, see NEGLIGENCE, 54, 55.

METROPOLITAN WATER SUPPLY ACT.

Under St. 1895, c. 488, § 14, as amended by Sts. 1899, c. 342, 1900, c. 108, §§ 1, 2, 1901, c. 498, 1904, c. 186, a petition for damages for the taking by the metropolitan water commissioners of an alleged easement in gross to maintain a certain pond for the purpose of cutting ice, where by the same

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instrument of taking the land under the pond was taken, must be filed "within two years after the actual taking by right of eminent domain of such real estate or any interest therein," and the provisions of the amending statutes extending the period of limitation in the case of petitions for damages for the taking of water rights where no land is taken in connection with such water rights have no application. *Carville* v. *Commonwealth*, 570.

MILFORD WATER COMPANY.

As to exemption from taxation of lands in Hopkinton taken by Milford Water Company, a public service corporation, for purpose of supplying inhabitants of Milford with water, see TAX, 12, 13.

MILLS AND MILL PRIVILEGES.

Question whether taking of land under St. 1893, c. 277, for supplying Walpole with water, which includes taking of all easements necessary for holding and preserving such water, would deprive riparian owner below land taken of right to build dam under mill act and set back water, paying damages to owner, not being raised, was not decided, see WATERWORKS, 1, 2.

MISTAKE.

Mistake of law of holder of promissory note of town in supposing that treasurer of town had authority to renew note which holder surrendered for that purpose does not prevent him when suing on surrendered note from showing that instrument accepted in renewal was forgery, see BILLS AND NOTES, 4.

MORTGAGE.

Of Real Estate.

On a petition in the Land Court under R. L. c. 182, § 15, for the discharge of a mortgage incumbering the record title of the petitioner to certain real estate, if the petitioner shows his record title to the property, the incumbrance by the undischarged mortgage, and his possession for twenty years without payment upon the mortgage or recognition of it in any way, he is entitled to a decree discharging the mortgage. *Mitchell* v. *Bickford*, 214.

Right of mortgagee is subject to mechanic's lien where doctrine of instantaneous seisin does not apply because mortgage was not made for purchase money but was separate transaction and contract with petitioner was made before mortgagor acquired land, see MECHANIC'S LIEN, 1, 4, 5.

Mortgage note barred by special statute of limitations is not debt of estate to be paid by executor or administrator, but, where sale of real estate is necessary to pay debts of estate, mortgaged portion will be sold subject to the mortgage which is an incumbrance, see EXECUTOR AND ADMINISTRATOR, 3.

Foreclosure of mortgage of real estate will not be restrained in suit in equity brought by one, claiming dower, who had procured divorce from husband

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on grounds of adultery where it appears that husband during coverture had procured conveyance by former owner to husband's sister in trust for his benefit and she by his direction conveyed it to mortgagee, for value and without notice, see DOWER, 3.

MUNICIPAL CORPORATIONS.

Officers and Agents.

Laying out of street by city council where matter was passed upon by successive councils and their committees and view taken by joint committee on highways, see WAY, 1–3.

Power of mayor and aldermen of city under R. L. c. 49, §§ 1, 3, to construct sewer through private lands not street or way and to make assessment for benefits therefrom, see TAX, 4.

Validity of veto by mayor of Boston under city's charter returned by him more than ten days after delivery of vote of board of aldermen and city council to his clerk but within ten days after it was presented to him personally, see BOSTON, 3, 4.

Agreement by street commissioners of city of Boston not to assess betterments for laying out of street not made under St. 1902, c. 503, is not enforceable, and such agreement contained in deed to city dated when it was practice of commissioners to accept such deeds, but delivered when such was not their practice and by them pigeonholed, will not sustain action for repayment of betterments paid under protest, see BOSTON, 1, 2.

Selectmen's failure to state in warrant for town meeting a vote intended by them to purchase a water company's plant, and failure to disclose such vote after it was passed to voters before meeting is not evidence of corruption sufficient to support charge of conspiracy unless there is proof to connect it with fraudulent conduct or unlawful purpose, see CONSPIRACY, 3.

Evidence bearing on question of forgery of promissory notes of town in action by *bona fide* holder of notes against town where defence is forgery by town treasurer, it being held that while burden is on such holder to show by fair preponderance of evidence that notes were genuine, he need not exclude possibility of forgery, see EVIDENCE, 9; BILLS AND NOTES, 5.

Ordinances and Orders.

Construction of ordinance and orders of city other than Boston providing for sewer running in part through private land not a street or way, and for assessments therefor, as coming within R. L. c. 49, §§ 3, 5, see TAX, 4–7.

Power of board of aldermen of city in granting location to street railway company to impose conditions as to paving and repairing of surface of streets, construction of certain conditions so imposed, and enforcement of them by bill in equity, see STREET RAILWAY, 2–4.

Elections.

1. Under R. L. c. 11, §§ 266, 267, except in towns where the official ballot is used or where the officers are "voted for on one ballot," there can be no

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recount of the votes cast for an officer of a town after the result of the election has been announced and recorded and the meeting has been adjourned. *Eldridge* v. *Selectmen of Chatham*, 409.

Acts of Town Meeting.

2. Under R. L. c. 25, § 31, a vote of a town to purchase the plant and privileges of a water company for the purpose of supplying its inhabitants with water is of no effect unless preceded by a vote of the selectmen authorizing the purchase. *Revere Water Co.* v. *Winthrop*, 455.
3. Under R. L. c. § 25, § 31, a vote by a majority of the voters of a town can have no effect in ratifying a vote of its selectmen to purchase the plant and privileges of a water company for the purpose of supplying the inhabitants of the town with water unless the selectmen voted to make the purchase before the warrant for the meeting was issued and their action was stated in the warrant. *Ibid.*
4. Where a vote of a town to purchase the plant and privileges of a water company for the purpose of supplying the inhabitants of the town with water is void under R. L. c. 25, § 31, because when the warrant for the meeting at which the vote was passed was issued the selectmen of the town had not voted to make the purchase and no action on their part was stated in the warrant, if thereafter the water company gives notice of its acceptance of the vote passed at the meeting, and a deed is delivered in pursuance of the vote and a semblance of taking possession of the works by the town occurs, these acts impose no obligation on the town to accept or pay for the works under the terms of the vote, especially where the town by another vote less than three months later expressly rejects the attempted purchase; and, if the deed has been recorded and the town has acquired a right to the conveyance of the plant and privileges under an agreement made according to a subsequent statute, it is entitled in equity to a decree of cancellation to remove the cloud upon its title. *Ibid.*
5. St. 1905, c. 477, § 12, gave the Revere Water Company, which was authorized to supply the town of Winthrop and its inhabitants with water, the right on a notice within thirty days of the acceptance of the act by that town to sell to the town all its property therein at a fair value to be ascertained as provided in § 13 of the act, authorized such purchase by the town to be voted for by ballot at a special or an annual town meeting, and provided that if the town should vote to purchase the property after notice given by the company, the company should within thirty days after the vote execute and deliver to the town proper deeds and writings conveying the property to the town. The town accepted the act, and the company within thirty days thereafter gave the notice of its desire to sell its property to the town. At a meeting held about two months after its acceptance of the act the town rejected the company's offer to sell the property, but two months later at another meeting voted to accept the offer and purchase the property. The company failed to deliver a deed of the property either within thirty days of the last named vote or at any time thereafter. The town brought a suit in equity against the company to compel the specific performance of the contract under the statute by a

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conveyance of the property. *Held*, that a contract of sale existed under the terms of the statute; that the rejection of the company's offer at the first town meeting after it was made did not exhaust the right of the town to vote upon the proposition of purchase, and that the vote of acceptance at the second meeting was within a reasonable time; that the failure to deliver a deed within thirty days after the vote to purchase, as required by the statute, did not lessen the obligation of the company to deliver such a deed after the thirty days had expired, and that the town was entitled to a decree for the specific performance of the contract. *Revere Water Co.* v. *Winthrop*, 455.

Corporate Liability.

Town liable to landowner injured by overflow from pond with no outlet into which its selectmen and agents had caused water to flow in draining land taken by town for widening street, see NUISANCE, 1.

Corporate Rights as to Highways.

Land Court has jurisdiction to determine whether public has acquired right of way by prescription over land of petitioner for registration adjoining highway in city and city has right of appeal from decree of Land Court deciding that no such right exists, see LAND COURT, 1, 2.

Waterworks.

Taking of land under St. 1893, c. 277, for supplying Walpole with water held to include taking of right of lower riparian owner by constructing dam to flow land taken. Whether such taking would deprive such owner of right to build dam under mill act and set back water, paying damages to owner, was not decided, see WATERWORKS, 1, 2.

Questions arising in connection with the purchase of plant of Revere Water Company by town of Winthrop, see *ante*, 2–5; CONSPIRACY, 2, 3; REVERE WATER COMPANY, 1, 2.

As to exemption from taxation of lands in Hopkinton taken by Milford Water Company for purpose of supplying inhabitants of Milford with water, see TAX, 12, 13.

NEGLIGENCE.

Due Care of Plaintiff.

Of child crossing street in front of electric car, see *post*, 2, 38, 39.

Of one crossing street railway track from intersecting street with steep grade, see *post*, 35.

Of one driving across street railway track ahead of car at a distance he thought safe, see *post*, 34.

Of one crossing street under elevated railway as train is passing overhead, see *post*, 41, 45.

Of traveller on street looking up as train passed on elevated railway above him, whereby "spark" flew into his eye, see *post*, 45.

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Of passenger passing between cars of elevated railway train and falling between platforms, see *post*, 40.
Of employee repairing rail of elevated railway and injured from electric current being turned on to third rail, see *post*, 4.
Of employee of elevated railway company working on track where trains pass and relying on superintendent to warn him, see *post*, 26.
Of fireman ascending ladder resting on concrete floor in boiler room, see *post*, 19, 20.
Of oiler assisting electrician in emergency in power house of electric light plant, see *post*, 9.
Of employee in iron foundry using icy plank walk leading to privy provided for workmen, there being another less convenient way he might have used, see *post*, 13–16.
Of one using corridor of building in performance of duties and falling through unguarded opening made by raising of trap door which he had never seen open, see *post*, 53.
Of one assisting owner of heavy iron machine in moving it from tip cart to railroad car two feet higher, see *post*, 1.
Of workman employed in removing curbstones piled with dunnage between them some of which may be rotten, see *post*, 23.

Assumption of Risk.

1. If the driver and proprietor of a tip cart and his employee who is assisting him in transporting a heavy iron machine for shipment by freight on a railroad, by direction of the freight agent of the railroad company, attempt to deliver the machine directly at the freight car, the floor of which is two feet higher than the cart, instead of at the station platform which is on a level with the cart, and, while they are assisting the freight agent and his assistant in moving the machine on skids placed by the freight agent as a bridge from the cart to the car, the machine falls and injures them owing to the negligence of the servant of the railroad company assisting the freight agent, they can be found to have been in the exercise of due care and not to have assumed the risk of such an accident. *Pearlstein* v. *New York, New Haven, & Hartford Railroad*, 20.
Assumption of risk by employee, see *post*, 4, 6, 13, 22, 23.
By passenger riding on front platform of street car knowing of notice of company to passengers that they ride there at their own risk, see *post*, 28, 29.

Imputed.

Boy sitting on side of pung and injured by being struck by passing street car because of negligence of driver of pung in driving too near track cannot recover from street railway company, see *post*, 36.
Due care of driver beside whom plaintiff was seated, see *post*, 35.

Of Child or Parents.

2. There is an age of a child, beyond that at which as matter of law he is incapable of exercising care and before reaching that at which as matter of law he is capable of exercising care, when, in an action by the child for

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personal injuries, it is a question of fact for the jury whether under the circumstances attending his injury he was incapable of exercising care so that no care on his part personally need be proved. *Sullivan* v. *Boston Elevated Railway*, 37.

Whether child of four years and three months was negligent or whether his parents were guilty of such negligence as to bar recovery by child for injuries from being run over by electric car because of negligence of employees of street railway company, held, under circumstances, questions properly submitted to jury, see *post*, 38, 39.

Trespasser.

Shop girl travelling on railroad on ticket procured by her false representations that she is student under eighteen years of age is trespasser and cannot recover from railroad company if injured in collision unless collision occurs through wanton and reckless disregard of consequences by company's servant; and fact that conductors accepted her tickets makes no difference, whether they knew of her fraud or not, see *post*, 46; CARRIER, 1, 2.

Employer's Liability.

Assumption of risk.

By workman employed in removing curbstones piled with dunnage between them some of which may be rotten, see *post*, 23.

By workman employed to clean articles by use of revolving brush of flexible object getting caught in brush, see *post*, 6.

By workman in iron foundry using plank walk to privy provided for workman having on it accumulation of ice and snow, see *post*, 13.

Workman repairing elevated railway rail, understanding electric current to be turned off third rail, does not assume risk of injury from current being turned on without warning, see *post*, 4.

By experienced carpenter, who for long time has been used to handling timbers with derrick, of risk of timber swinging when being moved by derrick and hitting pile of timbers and causing one of them to fall, see *post*, 22.

Fellow servant.

3. In an action against those in control of a building by one temporarily in their employ who was injured by falling into an opening in the floor of one of the corridors of the building from which a trap door had been removed by an assistant janitor without guarding the opening by any barrier, if it has been found that the defendants had made no provision for a barricade or warning, it is no defence that it was the practice of the janitor and the assistant janitor when the trap door was taken off to place a ladder or settee or other object across the corridor, that such articles were kept in a room near by, and that the accident was caused by the negligence of the assistant janitor, a fellow servant of the plaintiff, in omitting this customary precaution, unless it also is shown that such precautions were taken with the knowledge and approval of the defendants. *Falardeau* v. *Hoar*, 263.

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Dangerous place to work.

4. In an action against an elevated railway company, which operated its elevated trains by means of a third rail transmitting electric power, for personal injuries incurred by the plaintiff while working as a night laborer with a large gang of workmen in relaying about five hundred feet of the defendant's north bound track, it appeared, that the plaintiff was injured from being burned by a flash of electricity when in compliance with an order of his foreman he struck the third rail with a long bladed hammer, called a chisel, that the accident happened about half past four o'clock in the morning, that the electric power usually was turned off the rail between the morning hours of one and five o'clock, when the trains did not run and the night gangs were at work on the tracks, that on the night of the accident the men were instructed when they went to work at one o'clock that the third rail was dead, that this was true, but that during the night the power was turned on for about one half the length of the job including the place where the plaintiff was at work, that this was done for the purpose of picking up some old rails on the south bound track by means of a working train, that for this purpose it was unnecessary to turn on the power on the north bound track which was being relaid, because the old rails could have been reached wholly by the south bound track, that some of the men were told in a general way that a portion of the rail was alive but the plaintiff was not so informed, and the evidence was conflicting as to whether the foreman under whom he worked was so informed, that at the time the plaintiff was injured he was assisting to remove a rail saw from one of the rails of the track within a few inches of the third rail, and in the performance of his work was ordered by the foreman to strike a blow with the chisel, which the foreman handed to him for the purpose, the use of which necessitated hitting the third rail, that he asked the foreman whether it was all right, and the foreman answered that the rail was dead, and the accident followed, that the defendant's engineer and foreman in control of the power had full knowledge that a large job was to be done that night, that it would have been an easy matter and a reasonable precaution to make the third rail dead along the whole portion of the track which was undergoing repairs, and that the defendant's chief operator received no orders that night to make the third rail dead. *Held*, that the jury were warranted in finding that the plaintiff was in the exercise of due care; that the plaintiff did not assume the risk of the unnecessary and concealed danger in the place where he was set at work; and that there was evidence of negligence on the part of the defendant in turning on the power on the north bound track when the south bound track could have been used for the running of the working train. *Keeley* v. *Boston Elevated Railway*, 481.

Defective or dangerous machinery or appliances.

5. *Semble*, that the fact that a workman employed to oil machinery in the power house of an electric light company on coming in contact with an iron post in the building was killed by a charge of electricity, is not in itself evidence of negligence on the part of his employer. *Mehan* v. *Lowell Electric Light Corp.* 58.

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Negligence (*continued*).

6. A workman employed to clean and polish articles by means of a revolving brush attached to a simple machine assumes the obvious risk of an accident caused by a flexible object, such as a circular bicycle chain which he is cleaning, getting caught in the brush and wound around the brush and shaft. *Lennon* v. *Goodrich*, 293.
7. It is not the duty of an employer, who sets a boy seventeen years of age at work to clean and polish a circular bicycle chain on a revolving brush attached to a simple machine, with which the boy is familiar although he does not know the number of revolutions of the brush per minute, to warn or instruct him of the danger that the chain being flexible may get caught in the brush and be wound around the brush and shaft. *Ibid.*
8. It is evidence of negligence on the part of an electric light corporation, that, after having knowledge from the fact that electric shocks were received by masons at work in the basement of its building that its system in use for carrying off superfluous electricity was not working properly and that electricity had found its way into the iron framework in the building, it continued on the next day to use the same system without change and without giving notice to its employees of the danger of receiving a charge of electricity on coming in contact with the iron work. *Mehan* v. *Lowell Electric Light Corp.* 53.
9. In an action under R. L. c. 106, § 73, by the next of kin of an employee of an electric light corporation against the corporation for causing his instant death, there was evidence that the deceased was an oiler whose ordinary duties were to oil and clean the engines in the engine room of the power house of the defendant under the direction of the engineer, that on a shelf about two feet from the level of the engine room floor were instruments called regulators, the purpose of which was to increase or diminish the amount of the current sent out over the lines, and which were connected with a switchboard which was on a platform above the regulators eight or ten feet high reached by steps from the engine room floor, that the passage from the engine room floor to the regulator shelf was closed by two parallel iron bars one end of each of which was supported in a socket in the brick wall of the building and the other end in a socket screwed to a wooden post near one of the iron posts that supported the framework of the switchboard platform, this iron post being about three inches from the engine room floor and separated from it by the bars, that a passage to the regulator shelf could be opened by unscrewing the bars from the sockets at one end and pushing them through the sockets attached to the wooden post which supported them at the other end, that the regulators and the switchboard were in charge of the defendant's electrician, that while the electrician, the engineer and the deceased were on the engine room floor, there came a loud report and a flash, that one of the regulators was smoking, that a little flame coming out of one corner of it was on the chain cable leading to its side, and that the tape insulation was burning, that the deceased immediately rushed to the bar that had to be unscrewed and pushed through the socket before the electrician could get into the electrical enclosure to put out the fire, that the engineer after seeing to the engine followed, and all three men then took part in unscrewing and pushing

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aside the upper bar and thus enabled the electrician to step over the lower bar into the space where the regulators were, that he stepped through with a pail of sand in one hand and a scoop in the other and was scooping up the sand, when the deceased in some way came in contact with the iron post and was instantly killed by an electric current passing through his body. The engineer testified that in case of fire it was the duty of the deceased to assist in putting it out if possible, and the electrician testified that there was a fire four or five weeks earlier which he assisted in putting out, and that the engineer and the deceased were there assisting. *Held*, that the jury were warranted in finding that the emergency justified and required the deceased to be where he was, and in finding that he was in the exercise of due care. *Mehan* v. *Lowell Electric Light Corp.*, 53.

Ladder which slipped on concrete floor of boiler room held on facts not to be defective, see *post*, 12.

Employer not bound to furnish workmen with best possible appliances but only to exercise care in seeing that those he furnishes are safe and proper for use intended; and so not duty of railroad company to furnish stationary ladder or one with hooks upon it for use in engine room with concrete floor, see *post*, 10, 11.

Ways, works or machinery.

10. An employer is not bound to furnish his workmen with the best possible appliances but only to exercise care in seeing that those which he furnishes are safe and proper for the use for which they are intended. *McDonnell* v. *New York, New Haven, & Hartford Railroad*, 538.

11. It is not the duty of a railroad company to furnish a stationary ladder or one with hooks upon it in the boiler room of a car shop with a concrete floor maintained by the company. *Ibid.*

12. It is not evidence of a defect in a ladder about fifteen feet long used in the boiler room of a car shop with a concrete floor that it had V shaped points of iron at the bottom and that it slipped when used by the plaintiff and had done so once before. *Ibid.*

13. A workman in an iron foundry does not assume the risk of injury from falling by reason of a dangerous accumulation of snow and ice which his employer negligently has allowed to remain on a plank walk leading from the rear of the foundry to a privy provided for the accommodation of the workmen. *Urquhart* v. *Smith & Anthony Co.* 257.

14. A plank walk maintained by an employer for the use of his workmen, which is constructed properly but temporarily is rendered less convenient for travel by an accumulation upon it of snow and ice, may be used by the workmen in the course of their employment without negligence being imputed to them as matter of law if they are injured from falling by reason of the condition of the walk. *Ibid.*

15. If a workman is injured by falling on a plank walk, which it is the duty of his employer to maintain in a suitable condition, and which is in a dangerous condition caused by an accumulation of snow and ice, the fact that he could have gone to his destination by another way which was free from snow and ice but less convenient does not as matter of law show that he

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was negligent in using the walk, and in an action against his employer for his injuries the question of his due care may be one for the jury. *Urquhart* v. *Smith & Anthony Co.* 257.

16. If a workman uses a plank walk, which it is the duty of his employer to maintain in a suitable condition, knowing from his previous use of the walk that it is covered with uneven and ridgy snow and ice, and knowing also that the night before a light snow has fallen which may cause his footing to be still more unstable, this does not make his use of the walk negligent as matter of law, and if he sues his employer for injuries from a fall caused by the condition of the walk the question of his due care may be one for the jury. *Ibid.*

17. A plank walk leading from the rear of an iron foundry to a privy provided for the accommodation of the workmen can be found to be a part of the permanent ways of the foundry, so that both at common law and under R. L. c. 106, § 71, it is the duty of a corporation operating the foundry to maintain the walk in a suitable condition for the use of its workmen, and if snow and ice are allowed to accumulate on the walk in such quantities that when trampled and then frozen the surface is rendered uneven and dangerous and so continues for several days until a workman falls upon it and is injured, there is evidence of negligence on the part of the corporation toward the injured workman. *Ibid.*

18. In an action under R. L. c. 106, § 71, by a workman in a foundry against his employer for injuries caused by falling on a plank walk intended for the use of the workmen on which the defendant negligently had allowed a dangerous accumulation of snow and ice to remain, if the defendant relies on the provision of § 77 of the same chapter that such an employee shall have no right of action if he "knew of the defect or negligence which caused the injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer," the burden of proof is on the defendant to establish this defence affirmatively, and even if the plaintiff admits knowledge of the snow and ice it still is a question of fact for the jury whether he also should have known before the experience gained by his fall that the walk thus was made defective. *Ibid.*

Duty to warn.

Not duty of railroad company or of its superintendent to warn workman in repair shop of obvious danger consequent on moving of pair of detached driving wheels of engine, see *post*, 24.

Superintendence.

19. If a superintendent in the boiler room of a car shop with a concrete floor places a long ladder against a boiler and says to a fireman under his control "Go up the ladder and shut off that steam up there, that valve," and tapping him on the shoulder says "Go ahead Mac," this does not excuse the fireman for failing to attend to his own safety in going up the ladder before looking to see that it is placed firmly. *McDonnell* v. *New York, New Haven, & Hartford Railroad*, 538.

20. If a superintendent in the boiler room of a car shop with a concrete floor places a long ladder against a boiler and orders a firemen under his

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control to go up the ladder and shut off the steam, the slight act of assistance in placing the ladder is not an act of superintendence and does not relieve the fireman from looking to see that the ladder is placed safely before attempting to ascend it. *McDonnell* v. *New York, New Haven, & Hartford Railroad*, 538.

21. Whether an engineer in the boiler room of a car shop of a railroad company, who has the direction and control of his assistants and the firemen but has no power to hire or discharge them, and who starts and stops the engines, sees to the cleaning of them, the filling of the oil cups and the packing of the engines, and does other manual labor as required, can be found to be a person whose sole or principal duty is that of superintendence, *quaere*. *Ibid.*

22. An experienced carpenter, who for a long time has been used to handling heavy timbers with a derrick and who is employed with others under the orders of a superintendent in moving by means of a derrick a pile of timber which has been left as it was when unloaded, need not be instructed or warned that if while one of the timbers is being moved by the derrick it swings around and hits the pile another of the timbers may fall, and assumes the obvious risk of an injury from such a cause. *Sampson* v. *Holbrook*, 421.

23. It is not the duty of the superintendent in charge of a yard where curbstones, some of them curved, are piled, to warn a workman, who from his previous experience is familiar with the way in which the curbstones are piled and with the general character of the dunnage placed between them to keep them steady and knows that if the curbstones are piled improperly or if the dunnage is rotten the pile or a part of it may be rendered unstable and some of the stones fall off, and who when preparing to remove a curbstone from such a pile by means of a derrick has an unobstructed view of the pile, that he may be injured by some of the stones sliding or falling upon him owing to improper piling or the giving way of decayed dunnage. *Regan* v. *Lombard*, 319.

24. It is not the duty of a railroad company maintaining a repair shop for its locomotive engines, nor of its superintendent in charge of the shop, to warn a workman employed there as a helper to assist the engineer, that a pair of wheels of a locomotive engine attached to an axle, weighing about seven thousand pounds, which have been taken from the engine and are on a fall table in a pit used for the purpose of taking off wheels and replacing them, if put in motion on a track on the fall table cannot be stopped quickly and will have considerable momentum, and that it is unsafe for a workman after such wheels are thus in motion to take a position against a corner of a recess in a wall of the pit where a crank pin attached to the outside of one of the wheels may strike him. *Duffy* v. *New York, New Haven, & Hartford Railroad*, 28.

25. It is not evidence of negligence on the part of a superintendent of the repair shop of a railroad company, that before leaving certain workmen in charge of a pair of wheels of a locomotive engine attached to an axle which had been taken from an engine for repairs he had failed to provide something with which to block the wheels when the workmen wished

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to stop them or keep them in a particular position on a track, if it appears that the workmen in the shop were accustomed to use for blocking the wheels what they called "scrap", consisting of pieces of wood or board or anything that came handiest to put under a wheel to block it, and that anything would have done for the purpose at the time in question. *Duffy* v. *New York, New Haven, & Hartford Railroad*, 28.

26. In an action against an elevated railway company by a workman in its employ for personal injuries, if it appears that the plaintiff was put at work by a superintendent of the defendant upon a track on a loop of the defendant's elevated structure over which trains frequently were passing, both the superintendent and the plaintiff knowing it to be a dangerous place, that the plaintiff looked up to see whether a train was approaching and the superintendent, who was standing near, saw him do it and said "All right, Jack," that thereupon the plaintiff went on with his work and was struck and knocked off the track by a passing train, and was injured, that an approaching train could be seen one hundred and fifty feet away, and that the superintendent as he stood there was doing nothing and gave the plaintiff no warning of the approach of the train, this warrants a finding that the plaintiff was justified in assuming that the superintendent was looking out for him and in acting accordingly, and therefore was in the exercise of due care, and also warrants a finding that the superintendent was negligent. *Dunphy* v. *Boston Elevated Railway*, 415.

For negligence causing death.

Action under R. L. c. 106, § 73, by next of kin of employee against employer for causing instant death of employee is maintainable where they were but partially dependent upon his wages for support, see *post*, 48, 49.

Action under R. L. c. 106, § 73, by next of kin of oiler employed in electric lighting plant and killed while assisting electrician in emergency, see *ante*, 8, 9.

Street Railway.

Injury to passenger.

27. If a passenger, who is riding on the front platform of an electric car after he has read a sign stating that persons riding on the front platform do so at their own risk, is injured by a collision of the car with a repair wagon of the company operating the car, which would not have injured him had he been inside the car where there was room for him, he cannot recover from the company. *Pike* v. *Boston Elevated Railway*, 426.

28. In an action against a street railway company for personal injuries from a collision while the plaintiff was riding on the front platform of an electric car of the defendant after he had read a notice stating that persons riding on the front platform did so at their own risk, the plaintiff on his cross-examination was asked whether he did not appreciate that if he rode on the front platform and suffered an accident he took the risk of its happening, and answered "I knew that the sign was a dead letter." *Held*, that this answer, at the most, was only an expression of opinion, and had no tendency to show that the rule had been waived or abandoned by the defendant. *Ibid.*

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29. In an action against a street railway company for personal injuries from a collision while the plaintiff was riding on the front platform of an electric car of the defendant after he had read a notice stating that persons riding on the front platform did so at their own risk, evidence that the only other person on the front platform was the motorman, that the conductor collected the plaintiff's fare while he was there, and that nothing was said to him by the conductor or the motorman about standing on the platform, that persons frequently rode on the front platforms of the defendant's cars, that the conductors collected their fares there and that neither the conductors nor the motormen objected to their riding there, has no tendency to show that the defendant's rule had been waived or abandoned. *Pike* v. *Boston Elevated Railway*, 426.

30. If, in an action against a street railway company for personal injuries, there is evidence that the plaintiff was seated at about the middle of a box car of the defendant which was "going quite fast" when a "big crash" came and the car did not go any farther and a piece of iron came up through the wooden part of the seat between the cushions, that the plaintiff fell over on the iron and then swayed back and fell over on the other side on her right wrist and was injured, and if there is no evidence to show where the piece of iron came from and the defendant does not offer any explanation of the accident, there is evidence for the jury of negligence on the part of the defendant. *Hebblethwaite* v. *Old Colony Street Railway*, 295.

Injury to persons riding or driving on highway.

31. A motorman operating an electric car and the driver of a vehicle not running on a track while using a public highway owe to each other a reciprocal obligation of due care. *Rubinovitch* v. *Boston Elevated Railway*, 119.

32. In the use of a street of a city the motorman of an electric car and the driver of a vehicle not running on a track each is bound to use due care to avoid coming in contact with the other, and neither is entitled to assume that the other will keep out of his way. *Halloran* v. *Worcester Consolidated Street Railway*, 104.

33. A street railway company, although it owes to its passengers the duty of safe transportation which is imposed on a common carrier, is not required to exercise the same degree of care toward a traveller using the highway, and its duty toward such a traveller is performed if its servants exercise the care of an ordinarily prudent and careful man when called upon to act under the circumstances of the case. *Rubinovitch* v. *Boston Elevated Railway*, 119.

34. In the trial of an action against a street railway company for personal injuries from being run into by a car of the defendant while driving in a wagon across the defendant's track, the presiding judge properly may refuse to rule that as matter of law the plaintiff was not negligent in attempting to drive across the track if he judged at the time that this could be done safely because of the distance of the car from the point where he must cross, as the jury must determine the question of the

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plaintiff's due care or negligence on the whole evidence. *Rubinovitch* v. *Boston Elevated Railway*, 119.

35. In an action against a street railway company for personal injuries from a collision between a car of the defendant and a wagon in which the plaintiff was seated beside the driver, the plaintiff and the driver testified that as they approached a street, which entered the one they were on at a sharp descending grade and on which ran cars of the defendant, they were going about four miles an hour, that before crossing the street the driver "slowed up," that both looked and saw no car approaching, and listened and heard nothing. The driver further testified that he first saw the car approaching when his horse's feet were between the rails of the track, that he turned his horse to the left and the car struck the left front wheel. At the corner of the intersecting street on the side from which the car approached there was a large brick factory which cut off the view of the car tracks. There was a conflict of evidence as to whether the gong was sounded and as to the speed of the car. The plaintiff testified that "the car was coming at a great speed." The driver testified that "it was going at a pretty fast clip." *Held*, that the questions of the due care of the plaintiff and the negligence of the defendant were for the jury. *Halloran* v. *Worcester Consolidated Street Railway*, 104.

36. A boy, thirteen years of age, who, while sitting on the side of a pung loaded with boxes by permission of the driver, was injured from being struck by an electric car coming from the opposite direction, cannot recover from the railway company for his injuries, if the accident was caused by the negligence of the driver in driving so near the tracks that the plaintiff's knees necessarily struck the car and would have done so even if the car had stopped before the pung reached it. *Kane* v. *Boston Elevated Railway*, 386.

37. Although a street railway company in operating a postal car carrying the United States mail is required to exercise the same degree of care toward travellers on the highway as in operating other cars on the streets, it is not error for the presiding judge at the trial of an action for personal injuries caused by a collision with such a car, after giving proper instructions as to the due care of the plaintiff and the negligence of the defendant, to call the attention of the jury to the provision of U. S. Rev. Sts. § 3995, making it a criminal offence knowingly to obstruct or retard the passage of the mail, and by way of illustration of the comparative rights of carriers of mail to refer to the provisions of R. L. c. 16, § 143, in regard to the right of way in the streets of "United States forces or troops, or any portion of the militia parading or performing any duty according to law," providing that the carriage of the United States mail shall not be interfered with; and, if the plaintiff has testified that he did not know that the car with which he came in collision was a mail car, this does not make this portion of the charge inapplicable to the case if the plaintiff also has testified that he saw the car while at a distance of one hundred and forty feet from him before he turned to cross the defendant's track, as the jury may believe in spite of the plaintiff's testimony to the contrary that he knew the car to be a mail car. *Tepper* v. *Boston Elevated Railway*, 46.

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Injury to child crossing tracks.

38. In an action for personal injuries by a child run over by a car of a street railway company, if it appears that the plaintiff was a boy four years and three months of age, a lively child, active and energetic, that the car was running on a city street at the rate of from fifteen to twenty miles an hour, that the plaintiff was crossing the street with another boy who was slightly older ahead of him, and that he walked at a "pretty lively gait" or trotted "at a fair little jog" into the forward fender of the car which ran over him, it is a question for the jury whether the plaintiff has shown that he was incapable of exercising care and so was not required to exercise it in crossing the street. *Sullivan* v. *Boston Elevated Railway*, 37.

39. In an action by a child for personal injuries from being run over by a car of a street railway company, if it appears that the plaintiff was a boy four years and three months of age, a lively child, active and energetic, that the parents of the plaintiff with their three children occupied an apartment on the third floor of a house in which lived three families who used the hallway and front door in common, that it was a rainy day and the plaintiff's mother let him play in the hallway on the ground floor with another little boy who had come to play with him, that the mother was washing at a tub in a small kitchen opening into a small entry that led into the hallway on the third floor and that every few minutes she went about ten or twelve feet to the rail where she looked down to see the little boys, and she also could hear them at play while she was at the tub, that finally she missed them "because it was so quiet all of a sudden" and, after looking down and seeing they were not there, called to her husband to go down and see where the plaintiff was, that, while she was washing, her husband was in another room tending the baby who was sick, that the husband on going down learned that the plaintiff had gone with the other little boy out of the front door and had been run over by a car of the defendant, that the plaintiff's mother never allowed him to go out when it rained, that the father knew that the street outside was a dangerous place, that he heard the mother tell the boy to be sure and stay in the entry, and he told the boy not to go out of the entry on to the door steps, and did not think he would go out when he had told him not to, that "he was always a good boy to mind." *Held*, that the question whether the plaintiff's parents exercised due care was one of fact for the jury. *Ibid.*

Elevated Railway.

Injury to passenger.

40. In an action for personal injuries against a corporation operating an elevated railway, it appeared that the plaintiff was a small and frail woman who was unfamiliar with elevated cars and platforms and never had crossed from the platform of one car to that of another, that she had a young child in her arms, got upon the platform of a car of one of the defendant's trains and was entering the door when a brakeman speaking sharply said "Smoking car, madam; you can't go in there; cross over into the front car, and move quickly," that in attempting to obey him she fell between the cars receiving the injuries sued for, that in attempting to

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pass between the cars she did not look down, her mind being on the child, and the brakeman gave her no warning or assistance, that the platforms of the cars curved away from each other, the space between them being seven inches at its narrowest part and eleven inches at its widest part, that the curves of the platforms of the cars were determined by the shortest curve of the track which it was necessary for cars coupled together to pass and were no greater than was required for that purpose, that experiments had been made with a buffer coupling, which was the best device known for covering the space between the ends of the cars, and that the device had been shown to be impracticable. *Held*, that, even if there was evidence that the plaintiff was in the exercise of due care, which was doubted, there was no evidence of negligence on the part of the defendant. *Hawes* v. *Boston Elevated Railway*, 324

Injury to persons on street under elevated structure.

41. In an action against a corporation operating an elevated railway for an injury from a particle of metal thrown out in the operation of the railway getting into the plaintiff's eye while he was crossing a street under the elevated structure as a train was passing overhead, the fact that the plaintiff crossed the street under the moving train shows no lack of ordinary care on his part. *Woodall* v. *Boston Elevated Railway*, 308.

42. In an action against a corporation operating an elevated railway for an injury from a particle of metal thrown out in the operation of the railway getting into the plaintiff's eye while he was crossing the street under the elevated structure as a train was passing overhead, if no one saw where the particle of metal came from and the plaintiff contends that it was thrown off by the contact shoe and that the defendant was negligent in failing to provide an appliance for preventing the falling of such particles upon the street below, the plaintiff is not bound to exclude the possibility of the accident having occurred in some other way, but only to satisfy the jury by a fair preponderance of evidence that the accident occurred in the manner in which he contends that it did. *Ibid.*

43. In an action against a corporation operating an elevated railway for an injury from a particle of metal thrown out in the operation of the railway getting into the plaintiff's eye while he was crossing the street under the elevated structure as a train was passing overhead, the jury in answer to a question from the judge found that the piece of metal in the plaintiff's eye came from the operation of the contact shoe. The plaintiff testified that he was going under the structure and heard the noise of a train passing overhead and then the particle got in his eye. There was evidence that sparks frequently had been seen to fall in the general vicinity of the place of the accident when trains were in motion and that they sometimes fell in showers and reached the pavement. There also was evidence that the injury was caused by a particle of metal and not by a cinder, that there was a burn on the plaintiff's eye and that the particles thrown off by the contact shoe were hotter than those from the brake shoe, and also that the train was going in a direction where owing to the position of the stations there would have been no occasion to apply the brakes. There

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also was evidence tending to show that, although there had been a good deal of trouble from the sparking of the contact shoes, there had been no difficulty and no accidents to persons underneath by reason of sparks from the brake shoes. *Held*, that there was evidence warranting the finding of the jury. *Woodall* v. *Boston Elevated Railway*, 308.

44. In an action against the Boston Elevated Railway Company for an injury from a particle of metal thrown out in the operation of its elevated railway getting into the plaintiff's eye while he was crossing a street under the elevated structure as a train was passing overhead, in which the jury found on evidence warranting such a finding that the particle of metal came from the operation of the contact shoe, the jury also found that the defendant was negligent in failing to apply to the railroad commissioners for the approval of a pan to prevent the falling of such particles on persons below. St. 1894, c. 548, and St. 1897, c. 500, required the railroad commissioners to approve the plans for the railway before it could be constructed, and, after the completion of the whole or a part of it, required a certificate from them that it appeared to be in a safe condition for operation before the corporation could operate it. The commissioners approved the plan for the railway and gave the certificate for operation after it was constructed. There was evidence that after the operation of the railway began it was known that there was a good deal of trouble from the throwing out of particles of metal, called "sparking," which had not been anticipated when the railway was constructed, but that nothing was done to remedy it, and that it would have been feasible to construct a trough or pan which would have prevented the falling of sparks upon persons in the street, that the railroad commissioners had the matter of sparking under investigation and had made no recommendation and taken no action except to cause the investigation to be made. *Held*, that whether as matter of law the defendant should have applied to the railroad commissioners for the approval of a pan it was unnecessary to decide, but that, the jury having found that a pan was reasonably necessary, it was the duty of the defendant either to apply to the commissioners for their approval or to put up a pan without such approval, and that the finding of the jury was warranted. *Ibid.*

45. In an action against a corporation operating an elevated railway for an injury from particles of metal thrown out in the operation of the railway falling into the plaintiff's eye as he was passing under the elevated structure and looked up when he heard the noise of a train overhead, there was evidence that at the time of the accident a shower of such metal particles called "sparks" came down, that showers of sparks descended from the elevated structure with great frequency, that the sparks were or might be thrown out by reason of the friction of the contact shoe upon the third rail which supplied the electricity for moving the defendant's trains, that by the adoption of a different kind of shoe the injurious "sparking" might be avoided, or that a shield could be placed underneath the third rail to prevent the falling of the sparks into the highway. *Held*, that the question of the due care of the plaintiff in looking up as the train was passing overhead, the question whether the particles that got into the plaintiff's eye

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came from the train, and the question whether the defendant did all that reasonably could be required of it to prevent sparks from falling and injuring persons using the street beneath, were for the jury with proper instructions from the presiding judge. Following Woodall *v.* Boston Elevated Railway, 192 Mass. 308. *Walsh* v. *Boston Elevated Railway*, 423.

Injury to employee.

Action by employee for injury received while at work repairing rail on elevated railway by electric current being turned on to third rail without warning him, see *ante*, 4.

Action by employee for injury received while at work repairing track on elevated structure by being struck by a train of which he had no warning, see *ante*, 26.

Railroad.

Injury to trespasser.

46. If a shop girl over eighteen years of age, who is not a student, by means of false representations purchases from a railroad company a season ticket on its road issued at half price only for students under eighteen years of age, while travelling on the railroad upon this ticket she is not entitled to the rights of a passenger and is in no better position than a mere trespasser, and if while so travelling she is injured by reason of a collision, and there has been no such wanton and reckless disregard of consequences on the part of the servants of the railroad company as to make the company liable to a trespasser, she cannot maintain an action against the company for her injuries. *Fitzmaurice* v. *New York, New Haven, & Hartford Railroad*, 159.

Gross negligence.

Action against railroad company for recovery for conscious suffering and death of plaintiff's intestate alleged to be due to gross negligence of defendant's servant during unloading of heavy iron machine from shipper's cart to defendant's car, see *ante*, 1; *post*, 50, 51.

In Use of Highway.

47. In an action under R. L. c. 171, § 1, against the proprietor of a heavy wagon drawn by two horses, for causing the death of the plaintiff's intestate, a boy about five years of age, by the alleged gross negligence of a servant of the defendant, it appeared that the defendant's servant was driving the team at a pretty fast rate in a street twenty-two or twenty-three feet wide on the right hand side of the road two or three feet from the sidewalk, that the driver had his head partly turned toward the centre of the street and was talking with his helper who stood behind the seat, that a coal team in the middle of the road was coming toward him, and that when the teams were almost on each other, the defendant's servant gave his horses a quick jerk and turned them in toward the sidewalk to avoid the coal team, that, in so turning, the hind wheels slid in toward the sidewalk at a place where a plank had been placed in the gutter against a depression in the edgestone to make a more gradual ascent to a

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driveway over the sidewalk and into a yard, that the plaintiff's intestate had been playing there with another boy and was standing with his left foot on the plank and his right foot on the edgestone, that, when the wagon slid, one of the hind wheels ran up on the plank and ran over the intestate. It did not appear from the plaintiff's evidence that the driver saw the boy. *Held*, that there was no evidence to go to the jury of gross negligence of the defendant's servant, and that the presiding judge should have ordered a verdict for the defendant. *Manning* v. *Conway*, 122.

Negligence or due care of travellers on highway in crossing, walking or being on street railway tracks, see *ante*, 31–39.

Motorman of electric street railway car and driver of vehicle not running on a track each is bound to use due care to avoid collision and neither is entitled to assume that other will keep out of his way, see *ante*, 31, 32.

Questions of due care of child of four years and three months and of his parents, in action by child against street railway company for injuries from being run over while crossing street in front of car held under circumstances properly submitted to jury, see *ante*, 2, 38, 39.

Boy sitting on side of pung being driven in street and by negligence of driver too near tracks of electric railway cannot recover from railway company if struck by passing car, see *ante*, 36.

Due care of driver beside whom plaintiff was seated, see *ante*, 35.

Duty of company operating electric elevated railway to provide against injuries to travellers on street below elevated structure due to particles of metal falling from "contact shoe," see *ante*, 42–45.

Fact that traveller on street crossed street under elevated railway as train passed overhead shows no lack of ordinary care on his part, see *ante*, 41.

In action against street railway company by one injured in collision with postal car carrying United States mail, presiding judge in charging jury properly may refer to provisions of U. S. Rev. Sts. § 3995, with regard to obstruction of United States mail, and of R. L. c. 16, § 143, with regard to right of way of troops in streets, see NEGLIGENCE, 37.

Causing Death.

48. To entitle the next of kin of an unmarried employee to recover against his employer under R. L. c. 106, § 73, for causing his instant death, on the ground that the plaintiffs at the time of his death were dependent upon his wages for support, it is enough to show partial dependence. *Mehan* v. *Lowell Electric Light Corp.* 53.

49. In an action under R. L. c. 106, § 73, by the father and mother of an unmarried son against his employer for alleged negligence causing his instant death, brought as the next of kin of the deceased, "who, at the time of his death, were dependent upon his wages for support," it appeared that the family before the death of the deceased consisted of the plaintiffs with their two daughters, the deceased and another son, that the father was seventy and the wife sixty years of age, that the father earned certain money from time to time but had no regular work for all the year, that the mother was not very well and sometimes could not perform household duties, that the younger daughter had not worked for two years but

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Negligence (*continued*).

stayed at home and helped her mother in conducting the household, that the other daughter worked for regular wages, that the other son now surviving, who was a student in a medical school, lived at home but otherwise supported himself, contributing nothing to the support of the family and receiving nothing except his lodging and meals, that the son who was killed received $12 a week which he handed to his mother, that the father kept as pocket money $2 a week, and that his remaining wages, those of the working daughter and those of the deceased son, in all about $24 a week, were given to the mother for the support of the family of six, and the personal expenses of all but the son in the medical school, that after the death of the deceased the family contiued to live in the same house and to pay the same rent, and the mother testified that they had "plenty to eat and drink and wear." It appeared that since the death of the son the working daughter had had a slight increase of pay. *Held*, that the evidence warranted a finding that the plaintiffs were dependent, at least in part, on the son who was killed, and were entitled to maintain the action as his next of kin dependent upon his wages for support within the meaning of the statute. *Mehan* v. *Lowell Electric Light Corp.* 53.

50. The facts, that a freight agent at a railroad station insisted on receiving a heavy iron machine directly into a freight car, the floor of which was two feet higher than the cart in which the machine was brought for delivery, instead of receiving it on the station platform which was of the same level as the cart, and that, as the freight agent and another servant of the railroad company, assisted by the proprietor of the cart and his employee, were attempting to move the machine on rollers upon skids placed by the freight agent as a bridge from the cart to the car, the machine fell and killed the proprietor of the cart after conscious suffering, even if they are evidence of negligence on the part of the freight agent which would sustain a verdict against the railroad company in an action at common law for the injuries and conscious suffering of the deceased, which was not passed upon, are not evidence of negligence of the freight agent greater than a mere want of ordinary care, and will not sustain a verdict against the railroad company in an action brought by the administratrix of the estate of the deceased under R. L. c. 111, § 267, for causing his death. *Pearlstein* v. *New York, New Haven, & Hartford Railroad*, 20.

51. In actions respectively at common law and under R. L. c. 111, § 267, against a railroad company by the administratrix of the estate of one killed after conscious suffering by a heavy iron machine falling upon him while under the direction of the defendant's freight agent it was being unloaded from the cart of the intestate by the use of skids in an attempt to place it in a car of the defendant, evidence that an employee of the defendant, who was standing in the car holding a rope hitched to the machine with which he was expected to steady it and help to keep it in position, started to jump, dance and whistle and jerk the rope, but when told by an employee of the plaintiff's intestate to "stop" did not repeat these actions, and was pulling upon the rope at the time of the accident, is evidence for the jury of negligence of a servant of the defendant which will

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support a verdict in the action at common law for the injuries and conscious suffering of the plaintiff's intestate, but is not evidence of gross negligence of a servant of the defendant in the action under the statute and will not sustain a verdict for the plaintiff in such action. *Pearlstein* v. *New York, New Haven, & Hartford Railroad*, 20.

Action under R. L. c. 106, § 73, by next of kin of oiler employed in electric lighting plant and killed while assisting electrician in emergency, see *ante*, 5, 8, 9, 48, 49.

Action under R. L. c. 171, § 1, against proprietor of heavy wagon for death of boy of five years alleged to have been caused by gross negligence of driver of wagon held not maintainable because there was no sufficient evidence of such gross negligence, see *ante*, 47.

Gross.

Action under R. L. c. 171, § 1, against proprietor of heavy wagon for death of boy of five years alleged to have been caused by gross negligence of driver of wagon held not maintainable because there was no sufficient evidence of such gross negligence, see *ante*, 47.

Action against railroad company for death of plaintiff's intestate due to alleged gross negligence of defendant's servant during unloading of heavy iron machine from shipper's cart to defendant's car, see *ante*, 1; *ante*, 50, 51.

Of One owning or controlling Real Estate.

52. If those in control of a building maintain a trap door in one of its corridors set in an opening in the floor four feet square and lifted out by a ring, the opening being used only about twice a week, it is their duty to furnish suitable barriers, or objects which may be used as such, so that their servants when they have occasion to remove the trap door can guard or warn persons passing along the corridor without knowledge of the opening, and, in an action against them by a person injured from walking into the opening, a failure to provide for the use of such barriers is evidence of their negligence. *Falardeau* v. *Hoar*, 263.

53. If a person has passed many times through a corridor of a building and in doing so has walked over a trap door four feet square which can be lifted out by a ring, never having seen it open and not knowing it was there, and if in the performance of his duty and walking in the usual way he again passes along the same corridor by daylight at a time when the trap door has been taken off and the opening is left without barriers or anything else except the opening itself to indicate that the floor is not in its usual safe condition, and walks into the opening and is injured, in an action against the persons in control of the building for his injuries the question of his due care is for the jury. *Ibid.*

Those controlling building are liable for injuries to employee caused by his falling into opening in floor from which trap door had been removed temporarily if they made no provision for barricading opening or giving warning of its existence, and fact that fellow servants of employee had been in habit of putting ladders or settees up for barricade and negligently failed

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to on occasion in question is no defence if such precautions were not taken with defendant's knowledge and approval, see *ante*, 3.

Rights against lessor of servant of lessee of part of building injured on leased premises owing to non-repair are no greater than rights of lessee himself, see LANDLORD AND TENANT, 7, 8.

One owning and controlling house abutting on private way not part of his premises is liable to woman visiting on business another house abutting on same way for injuries due to nuisance in the way arising from negligent construction and maintenance of eaves, gutters and conductors of his house, see NUISANCE, 2, 3.

In constructing Sewer.

54. If no action can be maintained against the metropolitan sewerage commissioners for injury to property by the negligent and unskilful acts of persons employed by them in the work of constructing a sewer, which in this case there was no occasion to consider, this does not help a contractor employed by the commissioners when sued for injury to property caused by such acts on the part of himself or his servants. *Gibney* v. *Everson*, 228.

55. In an action against a contractor employed by the metropolitan sewerage commissioners for injury to property by the negligent and unskilful acts of persons employed by him in constructing a sewer, it is no defence that on a certain day the defendant sublet the contract to an independent contractor, if under the terms of his contract he had no right to sublet it, and if there is evidence that the contract of subletting was not genuine and the jury find this to have been the case, and if also the work was carried on by the defendant himself for about two months before the alleged subletting and the defendant makes no request that the jury shall separate the damages up to and after that date. *Ibid.*

Trap Door in Corridor of Building.

Liability of one controlling a building for injury to one passing through corridor and falling through unguarded opening in floor, see *ante*, 3, 52, 53.

In Railroad Repair Shop.

Action for injury to employee in railroad repair shop due to pair of detached and unblocked driving wheels of locomotive rolling against him not maintainable where workmen were accustomed to block wheels with anything that came handiest and where risk of such an accident was obvious, see *ante*, 24, 25.

In Electric Power House.

Action for death of oiler in power house of electric light company killed while assisting electrician in emergency, see *ante*, 5, 8, 9, 48, 49.

Freight Handling.

Action against railroad company by administratrix of one assisting shipper to unload heavy iron machine from cart directly into defendant's car under direction of defendant's freight agent for injury and consequent death

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alleged to be due to negligence of defendant or gross negligence of defendant's servants, see *ante*, 1, 50, 51.

Independent Contractor.

Defence that contract for constructing sewer was sublet by defendant to independent contractor held of no avail in action by one injured through negligence of those constructing sewer against one acting under contract with metropolitan sewerage commissioners which did not permit of subletting, especially where jury found subletting not to have been genuine, see *ante*, 54, 55.

Of Purchaser of Warranted Article.

One bringing action for breach of warranty of an article purchased held to be precluded from recovery because evidence showed him to have been negligent in relying on warranty which he knew to be false, see SALE.

Res Ipsa Loquitur.

Fact that oiler in electric light company's power house was killed by charge of electricity on coming in contact with iron post in building is not in itself evidence of negligence on part of employer, see *ante*, 5.

Evidence of "big crash," of iron coming through street car seat and injuring plaintiff, and of stopping of rapidly moving car, all unexplained by defendant, held sufficient to warrant submission to jury in action against company operating car, see *ante*, 30.

Proof by Circumstantial Evidence.

Action by traveller on street against company operating electric elevated railway for injuries alleged to have been caused by particle of metal falling from contact shoe of passing train maintained on circumstantial evidence, see *ante*, 41–45.

NOTICE.

Notice to absentee in proceedings in Probate Court under R. L. c. 144, § 9, see ABSENTEE.

No personal notice need be given to owner of land bordering on stream below land taken for purpose of supplying town with water under St. 1893, c. 277, of taking of his right to flow land taken, notice under statute having been filed in registry of deeds, see WATERWORKS, 1.

NUISANCE.

1. If a town, acting through its selectmen as its agents, in order to drain certain land taken by the town in widening a street under an order of the county commissioners, digs a ditch through the land of a private owner with his permission connecting with a drain already laid through his land, and thereby turns surface water from its natural course into a shallow pond with no outlet, causing it to overflow and flood a private way and the cellar of a landowner on the opposite side of the way, the landowner may recover from the town for the injury caused by the nuisance thus created. *Daley* v. *Watertown*, 116.

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Nuisance (*continued*).

2. A woman passing over a private way on which abuts the house occupied by a person employed by her as a dressmaker, while going to and returning from the house upon this business, has the rights of an abutter on the way as against one maintaining a nuisance thereon. *Cavanagh* v. *Block*, 63.
3. The owner of a house within his control abutting on a private way which is not a part of his premises, who constructs and maintains the eaves, gutter and conductor of the house in such an improper and negligent manner as to cause in the winter a dangerous accumulation of ice in front of the house upon the part of the way designed and fitted for travel, is liable to a person who while lawfully travelling on the way in the exercise of due care is injured by a fall caused by the nuisance thus created. *Ibid.*
4. Whether a person in control of premises adjoining a sidewalk which is part of a highway, who has cleared off the snow from the portion of the sidewalk next to his premises leaving the outer portion uncleared, is liable for an injury to a traveller on the highway caused by his not having cleared the whole of the sidewalk adjoining his premises, *quaere*. *Dahlin* v. *Walsh*, 163.
5. The owner of premises adjoining a sidewalk which is part of a highway in a city, in spite of any public duty to clear the sidewalk imposed upon him by the ordinances of the city, owes no duty to travellers on the highway to keep the sidewalk clear of ice and snow coming upon it from natural causes or to guard against accidents by scattering ashes or using any other like precaution. *Ibid.*
6. In an action against one in control of premises adjoining a sidewalk for injuries from a fall caused by an accumulation of ice on the sidewalk, there was evidence that the sidewalk was nine or ten feet wide and the defendant had shovelled off the snow to a width of six or seven feet, that there was a formation of smooth and slippery ice, thicker toward the curb and sloping toward the defendant's premises, and that the snow was higher near the street and still higher in the driveway of the street, that on the days preceding the accident there had been snow followed by rain and then by freezing weather, and that the day of the accident was clear and cold. *Held*, that the forming of the ice on which the plaintiff fell was amply accounted for by the weather conditions, and that a verdict for the defendant was ordered properly *Ibid.*

Liability of one controlling building for injury to one passing through corridor and falling through unguarded opening in floor, see NEGLIGENCE, 3, 52, 53.

OPTION.

Words "upon accepting this option" occurring in agreement of option for purchase of bonds held to mean exercise of option to purchase and not acceptance of agreement, see CONTRACT, 2.

PARKS AND PARK COMMISSIONERS

See METROPOLITAN PARK COMMISSIONERS.

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PARTNERSHIP.

1. Where a member of a business partnership organized in the form of a trust with transferable shares, who also is employed by the partnership at a salary, has made an agreement in writing with a copartner that whenever he leaves the employ of the company he will sell and convey his shares to his copartner at a certain price which the copartner agrees to pay, and subsequently gives a notice in writing under the contract that his employment has ceased, offers to transfer his shares, demands a settlement, and about two years afterwards brings a suit in equity to enforce the contract specifically and compel the payment to him of the agreed price for his shares, he cannot also maintain another suit in equity against his copartners or their representatives for an accounting for the profits accruing from his shares after the date on which he offered them to his copartner under the contract which he is seeking to enforce specifically. *Taber* v. *Breck*, 355.
2. Where a member of a business partnership organized in the form of a trust with transferable shares, who also is employed by the partnership at a salary, has made an agreement in writing with a copartner that whenever he leaves the employ of the company he will sell and convey his shares to his copartner at a certain price which the copartner agrees to pay, and subsequently gives a notice in writing under the contract that his employment has ceased, offers to transfer his shares and demands a settlement, but, instead of actually severing his connection with the company after giving his notice, continues to render services which are of value to the company and are performed with the knowledge of the representatives of his copartners and without any dissent from them, until they finally discharge him, when he brings a suit in equity to enforce the contract specifically and compel the payment to him of the agreed price for his shares, he is entitled in another suit in equity to recover from the members of the partnership the reasonable value of his services from the time of his giving the notice to the time of his discharge. *Ibid.*
3. One agreed in writing to lend to another $200 for three years with interest at the rate of six per cent per annum upon the security of a chattel mortgage on the stock of goods and fixtures of a cigar store in a certain place of which the lender was to procure a lease for the borrower. The lender also agreed to secure for the borrower a stock of cigars and tobacco to an amount of not more than $250, and was to be allowed interest at the rate of six per cent per annum on payments for this purpose until repaid by the borrower, the payments to be secured by the chattel mortgage. The borrower was to devote his time and attention to carrying on the cigar store in question, and from the proceeds of the business was to pay, first, the expenses of the business, second, the interest due to the lender, third, to take for his own use any balance not exceeding $20 per week, fourth, to pay one half of the remaining balance or net profit to the lender, keeping the other half for his own use, and also, when he had repaid all sums advanced by the lender, thereafter until the expiration of three years from the date of the lease of the cigar store, he was to pay to the lender one quarter of the net profits instead of one half. Goods and fixtures were

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obtained to fit up a cigar store in accordance with this contract and were mortgaged by the borrower to the lender to secure about $530 advanced by him under the contract. The lender never held himself out to any one as a partner of the borrower. An action of contract was brought against the lender and borrower as copartners for a balance of about $370 alleged to be due to the plaintiff for cigars and tobacco sold and delivered to the borrower for the business carried on under the contract. *Held*, that the lender was not liable as a partner, not being entitled under the contract to share in the profits as such, but only entitled to sums of money, to be determined by the amount of the profits, as a compensation for what he did and the risk that he ran in furnishing the money at six per cent interest. *Held, also*, that for the same reason the lender was not liable as an undisclosed principal for whom the borrower was acting as an agent. *Estabrook* v. *Woods*, 499.

4. On dissolution of a partnership, the right to an accounting accrues, and a bill in equity for an accounting between the partners filed more than six years after such dissolution is barred by the statute of limitations. *Eddy* v. *Fogg*, 543.

Rights of pledgee of partnership property wrongfully pledged by one partner to bank to secure individual debt, bank having no notice actual or constructive of partner's fraud, to enforce terms of pledge against receiver of partnership property, partnership and fraudulent partner having become insolvent, see PLEDGE, 2, 3.

Where one sold good will to partnership composed of two persons and agreed not to carry on business for certain period within certain city unless purchasers should cease within that period to carry on business in that city, fact that one of purchasing partners sells to other who continues in business does not release original seller from agreement, see EQUITY JURISDICTION, 9.

PASSENGER.

Who is passenger, see CARRIER, 1, 2.

Shop girl travelling on railroad on ticket procured by her false representations that she was student is not passenger but trespasser and cannot recover for injuries received by her not due to wanton and reckless disregard of consequences on part of railroad company or its employees, see NEGLIGENCE, 46.

PATENT.

1. A suit for the infringement of a patent which involves an inquiry into its scope and nature is within the exclusive jurisdiction of the federal courts. *Aberthaw Construction Co.* v. *Ransome*, 434.

2. Even if the patentee of his own invention is estopped to deny the validity of the patent as against the assignee of his rights, yet in a suit brought against him by his assignee for an alleged infringement he always can show the previous state of the art to which his invention relates as bearing upon the construction and scope of the patent and to show that the alleged acts are not violations. *Ibid.*

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PAYMENT.

Surrender of genuine note in exchange for forged note purporting to be renewal of it does not extinguish surrendered note, see BILLS AND NOTES, 3, 4.

Payment by administrator of estate of deceased person to one of two attorneys appointed by next of kin with bare authority to receive money, the other attorney not having authorized such payment, is no defence to action by next of kin against administrator for the money, the attorney paid having absconded, see AGENCY, 1, 2.

Under contract for sale of goods to be delivered in various shipments and to be paid for in cash thirty days after each shipment, seller may refuse to deliver shipments if previous shipments have not been paid for, and buyer cannot demand or compel further shipments if he has failed to pay for past ones, see CONTRACT, 7, 8.

Contract in writing for sale of cement by various shipments naming no times of payments ordinarily would call for payment on delivery of each shipment, but such construction becomes modified by conduct of parties in habitually making and receiving payment thirty days after delivery, or by such custom in cement trade at place of delivery, see CONTRACT, 3–5.

Where one brings suit in equity in this Commonwealth for breach of contract not to sell printing press to be used for specific purpose to any other person, such breach having occurred, and later brings action in another State against person to whom sale in breach of such contract was made and is compelled to join defendant here in action there, and afterwards settles action in other State by receipt of money from and release of original defendant there, release containing declaration that it was not intended to release plaintiff's claim against defendant in suit in this Commonwealth, while such release will not discharge suit here, such payment will be applied to reduce plaintiff's damages, see EQUITY JURISDICTION, 8.

PERPETUITIES.

See DEVISE AND LEGACY, 10–18.

PLEADING, CIVIL.

Declaration.

Under R. L. c. 173, § 8, a declaration in an action of contract against the guarantors of the performance of the covenants of a lease, who signed a guaranty providing that they should be severally and equally but not jointly liable, properly consists of different counts describing the different contracts entered into by the several defendants. *Tulane University* v. *O'Connor*, 428.

Amendment of declaration, see PRACTICE, CIVIL, 2, 3.

If general verdict for plaintiff in round sum is returned on count of declaration in action of tort claiming damages under separate independent items and presiding judge had refused to give ruling requested by defendant cor-

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rect and material as to some of the items, exception to such refusal must be sustained, see PRACTICE, CIVIL, 24.

Answer.

Insurance corporation in action on policy or certificate cannot rely on failure of insured to pay premium or assessment unless it sets up that defence in its answer, see INSURANCE, 5.

Alleged invalidity of contract as in violation of anti-trust law must be pleaded specially, see EQUITY PLEADING AND PRACTICE, 6.

PLEDGE.

1. The holder of a negotiable promissory note secured by collateral may pledge the note with its collateral to secure his own note, and the pledgee thereby becomes the holder of the pledged note with the right to collect it either by an action or by a sale of the collateral or both. *Eddy* v. *Fogg*, 543.
2. In a suit to wind up an insolvent partnership, where a receiver has been appointed and the assets of the partnership are in his hands, the holder of a secured note of the partnership should be allowed to prove his debt in full before the receiver and to participate in the distribution of the assets in the proportion to which this entitles him, without any deduction for the amount realized by him on the security, unless by permitting such proof the creditor would receive more than the face value of his debt, in which case the excess must be deducted. *Tebbets* v. *Rollins*, 169.
3. If a bank holds the note of a partnership indorsed by one of the partners and also holds an individual note of the same partner for which that partner wrongfully has pledged to the bank property of the partnership, but the bank has no notice actual or constructive that the property pledged does not belong to the pledgor individually, and if by the terms of the pledge the security is to be applied first to the payment of the note it is given to secure, and any excess may be applied in payment of any other liability of the pledgor to the bank, upon the insolvency of the partnership and also that of the pledgor, the bank as against the receiver of the property of the partnership has a right to apply any surplus from the proceeds of a sale of the pledged property after paying the pledgor's individual note to the liability of the pledgor as indorser of the partnership note held by it, in the same way as if the property pledged had belonged individually to the partner who pledged it. *Ibid.*
4. Where bonds are pledged as collateral security for the payment of a promissory note which provides that the holder on non-performance by the maker of his promise may sell the collateral or any part of it "in such manner as the holder hereof may deem proper, without notice, at any stock exchange, or at public or private sale, at the option of the holder hereof, and with the right on the part of the holder hereof to become purchaser thereof at such sale," and where upon default in payment of the note the holder, after actual and ample notice to the maker of the time and place of the sale, sells the bonds held as collateral by a proper auctioneer at a proper place at one of the auctioneer's regular auction sales, and bids in

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the bonds at a price very much less than other bonds of the same issue were sold for before and after the sale, and the person who bids in the bonds for the holder is the only bidder, these facts show no ground for setting aside the sale and do not constitute a conversion of the bonds by the holder of the note in thus purchasing them. *Farmers National Bank of Annapolis* v. *Venner*, 531.

5. A sale of bonds pledged as collateral security for the payment of a promissory note under a power of sale in the note is not invalidated by the fact that the bonds were advertised as six per cent bonds whereas the rate of interest had been reduced to five per cent, if the reduction in the rate of interest had taken place before the bonds were pledged and the pledgor never had caused them to be stamped as five per cent bonds, although he had called the attention of the pledgee to the reduction in interest and had suggested to the pledgee that it should have the bonds properly stamped as five per cent bonds, and if there is nothing to show that the sale was affected adversely by advertising the bonds as six per cent bonds, and it appears that six per cent bonds of the same issue were sold at auction by the same auctioneer before and after the sale in question for the same price as the five per cent bonds, and that both the pledgee and the auctioneer were justified in believing that it would make no difference whether the bonds were advertised and sold as six per cent bonds or as five per cent bonds. *Ibid.*

Administrator of insolvent estate of deceased trustee who had wrongfully pledged trust property to bank cannot be adjudged trustee unless proceeds of pledge can be traced and identified, nor can he be compelled to use general assets of estate to pay debt to bank in full and thus release property pledged, see TRUST, 6–8.

POWER.

Devise of real estate to one for life "with the right to dispose of the same as she shall think proper from the time of her death" held to give power to devisee to convey to trustee to dispose of as devisee shall direct, and then, by directing trustee to convey to her, to acquire title herself in fee simple, see DEED, 2.

POWER OF ATTORNEY.

Power of attorney given by next of kin of deceased person to two persons granting them bare authority to receive money from administrator of his estate does not authorize payment by administrator to one of attorneys named without consent of other, see AGENCY, 1, 2.

PRACTICE, CIVIL.

Premature Action.

Action by one employed as manager of corporation for discharging him without cause before expiration of period for which he was employed, brought after conversation with one having authority to discharge him in which he was told he was discharged but before receipt of letter from

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defendant informing him that his services as manager would terminate on next day, is not brought prematurely, see CONTRACT, 10.

Service of Process or Notice.

One proving debt against absentee under R. L. c. 144, § 9, to be paid from proceeds of property in hands of receiver need not give personal notice to absentee if he has given proper general notice to receiver and to persons within jurisdiction interested in estate, see ABSENTEE.

Parties.

1. The holder of a negotiable promissory note indorsed in blank, in which he has no beneficial interest, may maintain an action on the note against the maker if he has the assent of the beneficial owner to whom he is accountable for the proceeds. *Jump* v. *Leon*, 511.

Agent who made written agreement for hiring hall in behalf of undisclosed principal may bring action thereon in his own name and if he describes himself as "agent" in his writ, evidence of the undisclosed agency is not thereby made admissible, see AGENCY, 4, 5.

Amendment.

2. In an action upon a guaranty of the performance of the covenants of a lease, if the declaration is upon the guaranty as an instrument under seal and after the action is brought the fact is disclosed for the first time to the plaintiff that the defendants signed the guaranty without seals and that seals afterwards were affixed opposite their respective signatures by a stranger to the contract, the plaintiff may be allowed to amend his declaration by adding counts declaring upon the contract of guaranty as an unsealed instrument. *Tulane University* v. *O'Connor*, 428.

3. Under R. L. c. 173, § 48, and Rule 43, now Rule 40, of the Superior Court, that court may allow a plaintiff for whom a jury has returned a verdict on each of two counts, one under R. L. c. 171, § 2, for causing the death of the plaintiff's intestate, and the other at common law for causing conscious suffering of the plaintiff's intestate, to amend his declaration by striking out the count at common law, and whether the defendant may have been harmed by the introduction of evidence of conscious suffering is a matter to be considered by the presiding judge. *Manning* v. *Conway*, 122.

Claim of Trial by Jury.

4. Where a plaintiff has claimed a trial by jury and the defendant has not, and after the filing of an auditor's report the plaintiff waives a trial by jury, and the defendant six weeks later when the case is about to be reached for trial files a motion to restore it to the jury list and a motion to be allowed to file a claim for a trial by jury, if the judge is of opinion that the action of the defendant is taken for the purpose of delaying and obstructing the plaintiff in the prosecution of his claim, it is proper for the judge in the exercise of his discretion to deny the motions. *Clark* v. *Baker*, 226.

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Agreed Statement of Facts.

5. When a case is submitted upon an agreed statement of facts, the decision is to be made upon the facts actually stated unless there is a stipulation that inferences from the facts stated may be drawn. *Koppel* v. *Massachusetts Brick Co.* 223.

6. If an agreed statement of facts states that a certain person was a sublessee of a part of certain land "for a time equal to the remainder of the term of the original lease," this in legal effect is a statement that the person named was an assignee of the lease as to the portion of the premises stated to be sublet to him. *Hollywood* v. *First Parish in Brockton*, 269.

7. If an agreed statement of facts states that a certain parish made a lease "of a vacant lot of land," and it appears by the lease, a copy of which is annexed to the agreed facts, that the land leased was a portion of a lot of land owned by the parish and called the Parish Green, and that "the old meeting house now standing thereon" was sold by the parish to the lessees for a sum named, these statements in the lease contradict and control the statement in the agreed facts that the lot was vacant. *Ibid.*

Agreement of Counsel.

Judgment rendered on agreement of counsel in municipal court may be appealed from to Superior Court where validity of agreement may be determined, see *post*, 19, 20.

Auditor.

Auditor who has reported to court that view should be taken by him may be ordered to take view if judge is of opinion that it will tend to better understanding of case, see *post*, 9.

Election.

8. Where in a pending action of tort for personal injuries the parties file in court an agreement of submission to arbitration to determine the amount of the damages, which in the main is in the terms of a statutory submission under R. L. c. 194 but is void as a submission under that statute from a failure to comply with its terms, and the agreement is "allowed" by the court, if one of the parties to the action, in opposing a motion to dismiss the reference to arbitration and reject an award made under it, asks for rulings that the reference and the award are valid under the statute and are in compliance with its terms, that party is bound by these requests and afterwards cannot take the ground that the reference although void under the statute is good as a reference for the assessment of damages under an order of court. *Nay* v. *Boston & Worcester Street Railway*, 517.

Estoppel by Request for Ruling.

Where at hearing of motion to dismiss reference for arbitrament and award and to reject award made under it which, though "allowed" by court, is void because not in conformity with R. L. c. 194, party makes requests for rulings that reference and award are valid under statute, he cannot after-

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wards take ground that reference although void under statute is valid as reference for assessment of damages by order of court, see *ante*, 8.

Discretion of Court.

Proper exercise of discretion of presiding judge in conduct of trial, see *post*, 25; EVIDENCE, 6, 7, 10, 11; NEGLIGENCE, 37.

Judge in exercise of his discretion may order auditor to take view where auditor has reported such view should be taken and judge is of opinion it will tend to better understanding of case, see *post*, 9.

Judge held properly to exercise discretion in denying motions of defendant to restore case to jury list and to be allowed to file claim of trial by jury where in his opinion defendant was seeking to delay and obstruct plaintiff in prosecution of claim, see *ante*, 4.

Conduct of Trial.

Discretion of judge presiding at trial held properly exercised in excluding evidence of experiments, see EVIDENCE, 6, 7.

Testimony held rightly admitted within discretion of judge presiding at trial in connection with other evidence in action for alienation of affections, see EVIDENCE, 10, 11.

In charge to jury at trial of action against street railway company for injuries sustained because of collision with postal car carrying United States mail, presiding judge properly may refer to U. S. Rev. Sts. § 3995, with regard to obstruction of United States mail, and to R. L. c. 16, § 143, with regard to right of way of troops on streets; and, if plaintiff is apprehensive lest his own testimony that he did not know car was mail car has been overlooked by judge, he should call judge's attention to matter, otherwise he has no ground for exception, see *post*, 25; NEGLIGENCE, 36.

View.

9. Where an auditor reports to the court that in his opinion a view should be taken by him before he hears the evidence, the judge, if he is of the opinion that a view will tend to a better understanding of the case, in his discretion may authorize the auditor to take the view. *Clark* v. *Baker*, 226.

Set-off.

10. In an action on a promissory note the defendant cannot set off as a defence at law under R. L. c. 174, § 1, a note of the plaintiff which he purchased after the action was brought. *Jump* v. *Leon*, 511.

Equitable Defences.

11. Where an action on a promissory note is brought by one having no interest therein, to whom it has been transferred for the purpose of bringing the action for the sole benefit of the owner of the note who is not named in the writ, the defendant under R. L. c. 174, § 5, may be allowed to set off a claim against the beneficial owner of the note. *Jump* v. *Leon*, 511.

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12. Where after the bringing of an action on a promissory note by a holder having no interest therein the plaintiff in interest dies, and the solvency of his estate is admitted by the executrix of his will to be doubtful but in the Probate Court she does not represent the estate as insolvent, if the defendant after the bringing of the action has acquired in good faith and for value certain unmatured notes of the plaintiff in interest, and thereafter while the action is pending and before the death of the plaintiff in interest the notes mature, but a year has not elapsed since the appointment of the executrix, the defendant cannot prove against the plaintiff as an equitable defence under R. L. c. 173, § 28, the notes he has acquired, although he could do so if the estate of the plaintiff in interest had been declared insolvent by a decree of the Probate Court; but in such a case the defendant on his motion may be granted a continuance until a year from the appointment of the executrix has expired so that he can obtain judgment on his claim and set it off. *Jump* v. *Leon*, 511.

Verdict.

13. The effect of a verdict for a defendant on a special count, ordered by the presiding justice at a previous trial, on the right of the plaintiff at a new trial to go to the jury on a count on an account annexed involving directly or indirectly the same issues was here referred to by LORING, J. although not passed upon by the court. *Cadigan* v. *Crabtree*, 233.

Verdict by agreement of parties, in suit to establish mechanic's lien, of a certain sum in reply to question "What amount, if anything, is due the petitioner for labor performed and materials furnished . . . under said contract" prevents respondent from objecting that petitioner abandoned contract, see MECHANIC'S LIEN, 7.

If general verdict for plaintiff in round sum is returned on count of declaration in action of tort claiming damages under separate independent items and presiding judge had refused to give ruling requested by defendant which is correct and material as to some of the items, exception to such refusal must be sustained, see *post*, 24.

Assessment of Damages after Default.

14. Under R. L. c. 173, § 54, a defendant who has been defaulted and wishes to have the damages assessed by a jury must make a motion to that effect after the default. *Clark* v. *Baker*, 226.

Assessor's Report.

15. If a party to an action which has been sent to an assessor wishes to raise a point of law as to the measure of damages, he must ask the assessor for a ruling and except to its refusal, so that the alleged erroneous ruling may appear in the assessor's report and thus may be reviewed by the presiding judge. *Hart* v. *Brierley*, 147.

Continuance.

As to continuance of action to await judgment in action for counterclaim delayed to await expiration of year from filing of bond by executrix who

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is plaintiff in interest in original action against whom counterclaim is made, see *ante*, 12.

Rules of Court.

Under present Rule 40 of Superior Court judge presiding at trial before jury of action wherein declaration contains two counts, one for conscious suffering and one for death alleged to be due to negligence of defendant or gross negligence of defendant's servants, may allow amendment after verdict striking out count for conscious suffering, see *ante*, 3.

Concessions in Argument before Full Court.

16. A concession made by a counsel in his client's presence in conducting an argument before the full court in answer to a question of one of the justices as to his contention is regarded as made for the purposes of that hearing and cannot be introduced in evidence at a new trial of the case as an admission in behalf of his client. *Cadigan* v. *Crabtree*, 233.

Costs.

17. In an action of tort in the nature of trespass *quare clausum fregit*, where no right to an easement or a title to land is drawn in question, if the plaintiff obtains a verdict for more than $20 and afterwards by requirement of the presiding judge as an alternative to the setting aside of the verdict as excessive remits all of the damages in excess of $20, under R. L. c. 203, § 5, he can recover no costs. *Babbitt* v. *Shearer*, 600.

18. In an action for a trespass to land, if the trespass was casual and involuntary and the defendant tenders the damages, disclaims title and makes a payment into court in accordance with the requirements of R. L. c. 185, § 8, and if a verdict for more than the amount tendered is reduced by the plaintiff's voluntary act to less than the amount tendered, *semble* that the defendant is entitled to recover his costs. *Ibid.*

Appeal.

19. Under R. L. c. 173, § 97, the right of appeal to the Superior Court from a judgment of a police, district or municipal court or trial justice in a civil action includes an appeal from a judgment rendered on an agreement in writing signed by the parties or their attorneys, and, if the validity of the agreement is called in question by one of the parties in whose behalf it is signed, he has a right to have his case considered and determined in the Superior Court. *Preston* v. *Henshaw*, 34.

20. Against the oral objection of the plaintiff in person an agreement of counsel was filed in a case in a municipal court that the entry might be made of "Judgment for the plaintiff in the sum of $75 without costs and judgment satisfied." After a hearing, in which the plaintiff was represented by new counsel, an entry was made of "Judgment for plaintiff for $75 without costs by agreement," and another entry was made of "Judgment satisfied." The plaintiff appealed to the Superior Court. *Held*, that under R. L. c. 173, § 97, the plaintiff had the right to appeal from the judgment, and on such appeal could show that the agreement for judgment was made without authority from him, and that he was entitled to

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a larger sum than the amount named; *held also*, that the entry "Judgment satisfied" was not a part of the judgment and had no effect on the plaintiff's right of appeal. *Preston* v. *Henshaw*, 34.
Appeal from decree of Probate Court, see PROBATE COURT, 1, 2.
Appeal from decree of Land Court, see LAND COURT, 2.
Powers of Superior Court on appeal from Land Court as to framing additional and changing existing issues, see SUPERIOR COURT, 1, 2.
Right of person aggrieved by sewer assessment made by mayor and aldermen of city under ordinance authorized by R. L. c. 49, § 5, or by assessment authorized by § 3 of same chapter for benefits received from construction of sewer through private land not street or way, to revision by jury, see TAX, 5.

Exceptions.

21. No exception lies to the entire charge of a judge. *Gibney* v. *Everson*, 228.
22. The denial by a judge of a motion to recommit an assessor's report is not the subject of exception. *Hart* v. *Brierley*, 147.
23. A refusal to give an instruction in the language requested is not a ground for exception if the instructions given by the judge clearly and adequately cover the point raised by the request. *Rubinovitch* v. *Boston Elevated Railway*, 119.
24. Where in a single count of the declaration in an action of tort damages are claimed under separate independent items and a general verdict is returned for the plaintiff on the whole count in a round sum, if the presiding judge refused to give a ruling requested by the defendant which was correct and material as to some of the items the verdict cannot stand and an exception to the refusal of the ruling must be sustained. *Bilafsky* v. *Conveyancers Title Ins. Co.* 504.
25. In an action against a street railway company for personal injuries from a collision with a postal car owned and operated by the defendant engaged in carrying the United States mail, if the judge in his charge has commented on the character of the postal service and the plaintiff, who has testified that he did not know the car to be a mail car, is apprehensive that this testimony has been overlooked by the judge, he should call his attention to the matter and make this the ground of a specific objection to the charge or a request for further instructions, and in the absence of such objection or request he has no ground for exception if the jury find for the defendant. *Tepper* v. *Boston Elevated Railway*, 46.
Exception not argued treated as waived, see AGENCY, 8.

PRACTICE, CRIMINAL.

Testimony of Accomplice.

1. In a criminal trial in which the principal witness for the Commonwealth is an avowed accomplice of the defendant, there is no rule of law requiring the presiding judge to instruct the jury as to the weight to be given to the testimony of an accomplice. *Commonwealth* v. *Phelps*, 591.

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Exceptions.

2. In a criminal as in a civil case no exception lies to a refusal to give a ruling if the substance of the ruling is contained in the judge's charge or if it has been given so far as it is material. *Commonwealth* v. *Phelps*, 591.

PROBATE COURT.

Service of Notice.

One proving debt against absentee under R. L. c. 144, § 9, to be paid from proceeds of property in hands of receiver need not give personal notice to absentee if he has given proper general notice to receiver and to persons within jurisdiction interested in estate, see ABSENTEE.

Jurisdiction.

Probate Court, under R. L. c. 146, §§ 6–8, has power to authorize sale of real estate by executor or administrator to pay debts of estate, and this court, on bill in equity by executor for instructions as to which of several parcels should be sold, cannot direct or control that court in matter, but, all parties interested joining in prayer, will instruct executor how he should make application, see EXECUTOR AND ADMINISTRATOR, 5. For instance of instruction under such circumstances, see EQUITY JURISDICTION, 12.

Appeal.

1. On a petition under R. L. c. 162, § 13, for leave to enter an appeal from a decree of the Probate Court after the expiration of the time allowed for such entry, a finding of a single justice that the equities between the parties are such that he ought not to disturb the decree is a finding that justice does not require a revision of the case within the meaning of the statute. *Cawley* v. *Greenwood*, 126.
2. Under R. L. c. 162, § 13, providing that if a person who is aggrieved by a decree of the Probate Court "omits, without default on his part, to claim or prosecute his appeal and it appears that justice requires a revision of the case," the appellate court may allow an appeal to be entered and prosecuted, if the sole heir and next of kin of a person whose will has been allowed by a decree of the Probate Court after he received notice of the petition for the allowance of the will and until it was admitted to probate and for thirty days thereafter had sufficient intelligence and ability to have contested the allowance of the will or to have taken an appeal from the decree if he desired to do so, but, although requested to do so by his son, did not wish or intend to take any action in the matter, and took no action, he cannot be said to be "without default" within the meaning of the statute, and if he dies five months after the making of the decree his son, who has only the rights of his father, cannot maintain a petition under the statute for the entry of an appeal from the decree. *Ibid.*

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PUBLIC SERVICE CORPORATION.

As to exemption from taxation of lands in Hopkinton taken by Milford Water Company, a public service corporation, for supplying of inhabitants of Milford with water, and right of company to maintain petition for abatement of tax under R. L. c. 12, § 73, although result of granting petition would be to abate whole tax, and although it had included the land in list of taxable property returned by it to assessors, see TAX, 10–13.

RAILROAD.

Who is passenger upon, see CARRIER, 1, 2.

Actions against railroad companies for injuries to employees, see NEGLIGENCE, 10–12, 19–21, 24–26.

Action against railroad company for injury to trespasser assuming to travel as passenger, see NEGLIGENCE, 46.

Action against railroad company for death of employee due to alleged gross negligence of defendant's servants or agents, see NEGLIGENCE, 1, 50, 51.

Domestic corporations authorized to construct railroads in foreign countries are subject to domestic franchise tax imposed by St. 1903, § 74, as corrected and re-enacted by St. 1904, c. 261, and not to former tax of one twentieth of one per cent upon par value of capital stock, see CORPORATION, 4.

RAILROAD COMMISSIONERS.

Rulings of board of railroad commissioners, which by R. L. c. 112, § 100, Supreme Judicial Court or Superior Court has jurisdiction in equity to review, annul, modify or amend, are rulings of law and not findings or decisions upon questions of fact, and in such proceeding only evidence admissible is proof of evidence that was before such board, see EQUITY JURISDICTION, 15, 16.

RECEIVER.

One proving debt against absentee under R. L. c. 144, § 9, to be paid from proceeds of property in hands of receiver need not give personal notice to absentee if he has given proper general notice to receiver and to persons within jurisdiction interested in estate, see ABSENTEE.

Receiver who has elected to proceed by actions at law to enforce liability of stockholders of foreign banking corporation cannot at same time prosecute same causes by cross bill in equity in suit by stockholders to restrain him from proceeding with actions at law, see EQUITY JURISDICTION, 4.

Rights of pledgee of partnership property wrongfully pledged by one partner to bank to secure individual debt, bank having no notice actual or constructive of partner's fraud, to enforce terms of pledge against receiver of

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Receiver (*continued*).

partnership's property, partnership and fraudulent partner having become insolvent, see PLEDGE, 2, 3.

Receiver of foreign banking corporation appointed in State where it was organized to enforce stockholders' liability arising according to such State's laws after adjudication of corporate debts and exhaustion of other corporate assets will not be restrained from enforcing such liability here although in suit in such State in which corporation was adjudged insolvent, debts adjudicated and receiver appointed, stockholders, defendants in receiver's actions here, were not parties, the bank having been a party and the court one of competent jurisdiction, see EQUITY JURISDICTION, 11.

RECEIVING STOLEN GOODS.

On the trial of an indictment for receiving and aiding in the concealment of stolen goods, although possession by the defendant out of the Commonwealth of goods stolen in the Commonwealth would not in itself warrant a conviction, evidence of such possession is competent in connection with other evidence to show that the defendant received the goods in this Commonwealth knowing them to have been stolen. *Commonwealth* v. *Phelps*, 591.

REFERENCE AND REFEREE.

See ARBITRATION AND AWARD.

RELEASE.

Where one brings suit in equity in this Commonwealth for breach of contract not to sell certain type of printing press for specific purpose to any other person, and also has brought action in another State against person to whom sale in breach of such contract was made and is compelled in that action to join defendant here with defendant there, a release of the defendant purchaser in action in other State given in settlement of that action, which contains declaration that it was not intended to release plaintiff's claim against defendant in suit in this Commonwealth, does not bar suit here, although payment in action in other State operates as partial satisfaction of plaintiff's claim, see EQUITY JURISDICTION, 8.

RELIGIOUS SOCIETY.

Where a religious society has no further use for an old meeting house and the land on which it stands, abutting on a business street, it is not *ultra vires* for the society to let the land to a lessee who agrees to buy the meeting house and to covenant to pay to such lessee or his assigns on the termination of the lease a just and reasonable sum for such buildings and improvements as shall have been put upon the land during the term of the lease. *Hollywood* v. *First Parish in Brockton*, 269.

REPLEVIN.

Equitable replevin, see EQUITY JURISDICTION, 14.

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RES IPSA LOQUITUR.

Fact that oiler in electric light company's power house was killed by charge of electricity on coming in contact with iron post in building is not in itself evidence of negligence on part of employer, see NEGLIGENCE, 5.

Evidence of "big crash," of iron coming through street car seat and injuring plaintiff, and of stopping of rapidly moving car, all unexplained by defendant, held sufficient to warrant submission to jury in action against company operating car, see NEGLIGENCE, 30.

REVERE WATER COMPANY.

1. St. 1882, c. 142, incorporating the Revere Water Company and St. 1884, c. 259, authorizing it to supply the town of Winthrop with water, which were enacted subject to Pub. Sts. c. 105, § 3, gave to that corporation no vested rights inconsistent with a subsequent grant by the Legislature to the town of Winthrop to construct, operate and maintain a water supply system and furnish itself and its inhabitants with water. *Revere Water Co.* v. *Winthrop*, 455.

2. St. 1905, c. 477, § 12, gave the Revere Water Company, which was incorporated by St. 1882, c. 142, and was authorized by St. 1884, c. 259, to supply the town of Winthrop with water, the right, on a notice within thirty days of the acceptance of the act by that town, to sell to the town all its property therein used for supplying the town or its inhabitants with water at a fair value to be ascertained as provided in § 13 of the act, authorized such purchase by the town to be voted for at a town meeting, and provided that the town should not construct a distributing system for supplying water to its inhabitants under the authority of the act unless it first should have purchased the property which the company had notified the town that it desired to sell, and provided further that in case the company failed to perform all the terms set forth in the section, the town might proceed to construct, operate and maintain a water supply system and furnish itself and its inhabitants with water under the terms of the act. *Held*, that the statute was not an appropriation of private property for a public use without due process of law under the fourteenth amendment of the Constitution of the United States. *Ibid.*

Specific performance decreed of contract of Revere Water Company to sell to town of Winthrop its plant in that town made in accordance with St. 1905, c. 477, although a town meeting held two months after town's acceptance of act had rejected company's offer, a meeting held two months later having accepted it, see MUNICIPAL CORPORATIONS, 5.

RULES OF COURT.

As to Common Law Rules of Superior Court, see PRACTICE, CIVIL, 3.

As to Chancery Rule 35, see EQUITY PLEADING AND PRACTICE, 10.

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SALE.

In an action, by a corporation manufacturing chemicals against a corporation manufacturing tools and machinery, for money paid by the plaintiff to the widow and administratrix of one of its employees who was killed by the explosion of the revolving basket of a centrifugal drier which was sold to the plaintiff by the defendant, caused by the excessive speed of the revolutions alleged to have been due to the fact that the machine was fitted with a driving pulley fifteen inches in diameter instead of one that was twenty-four inches in diameter, it appeared, that the machine was ordered by the plaintiff's superintendent and, there being a delay in the delivery, the superintendent called up the defendant on the telephone and asked the person answering to send him a blue print of the machine, which he did, that the size of the driving pulley was given on the blue print as twenty-four inches in diameter, and the speed of the basket was marked at thirteen hundred and twenty revolutions per minute, that the plaintiff's superintendent turned over the blue print to the mill architect, who two months after the machine was delivered did the work of calculating the size of the pulleys and the revolutions of the different shafts and planned the shafting for a pulley twenty-four inches in diameter, that the defendant, which had no notice of the use which was to be made of the blue print, sent the machine with a driving pulley fifteen inches instead of twenty-four inches in diameter, the effect of which was that with the shafts and pulleys as planned by the mill architect the revolutions of the basket would be increased from thirteen hundred and twenty per minute, to two thousand or twenty-two hundred per minute, that the work of setting up the machine was done by an outside person employed by the plaintiff to do the work under the general supervision of the plaintiff's chief engineer, that both the chief engineer and the person employed to do the work noticed when the machine was set up that the size of the driving pulley was not the same as shown on the blue print, and the chief engineer knew that the pulley would make the machine go much faster than a twenty-four inch pulley, that these machines were manufactured and sold by the defendant in the general market to be set up and connected in the factory by the purchaser, that a driving pulley of some sort usually was sent with each machine, and the defendant furnished a pulley according to the speed of the main shaft if that was given, but that in this case no particular size of driving pulley was asked for and the defendant knew nothing about the speed of the plaintiff's engine or shaft, that the defendant's manager did not know until after the accident that the blue print had been sent, that a bill of the machine and the articles sent with it was sent by the defendant to the plaintiff about the time that the machine was sent, and that in this bill the pulley was described as a fifteen inch pulley. *Held*, that even if the blue print constituted an implied representation or warranty of the size of the pulley, which was doubted, there was no evidence warranting a finding that the plaintiff was justified in relying on the representation or was free from negligence

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in doing so, knowing that the size of the pulley furnished was smaller than that represented on the blue print and that the result would be to make the machine go much faster, and that a verdict properly was ordered for the defendant. *Merrimac Chemical Co.* v. *American Tool & Machine Co.* 206.

If one who has purchased goods transfers them to corporation afterwards created, this in itself has no tendency to connect corporation with original sale, see CORPORATION, 2.

Contract of sale of water works plant by Revere Water Company to town of Winthrop held completed and valid under St. 1905, c. 477, and enforceable by bill in equity for specific performance, see MUNICIPAL CORPORATIONS, 5.

Contract in writing for sale of cement to be delivered in various shipments mentioning no time of payment, where parties have made and received payments thirty days after date of delivery of each shipment and custom of cement trade at place of delivery is for such payment, construed as to times of payment and rights of parties *inter se* on failure of buyer to pay for shipments when payments were due, see CONTRACT, 3–5, 7, 8.

SAVINGS BANK.

Deposit in savings bank "in trust for E," who was depositor's nephew, held to belong to estate of depositor after her death, facts showing no delivery or acceptance of gift during depositor's lifetime, nor anything tantamount thereto, see TRUST, 5.

SEAL.

Effect of seals affixed without authority to signatures of guarantors of lease, see ALTERATION OF INSTRUMENTS.

SEISIN.

Doctrine of instantaneous seisin as applied to dower, and to mechanic's lien for work and materials furnished under contract with one who bought and on same day mortgaged land for building loan and not for purchase money, see DOWER, 4; MECHANIC'S LIEN, 1, 5.

SET-OFF.

See PRACTICE, CIVIL, 10.

Equitable defence in nature of set-off, see PRACTICE, CIVIL, 11, 12.

SEWER.

Power of mayor and aldermen of city under R. L. c. 49, § 1, to construct sewer through private lands and not in street or way, and to make assessments for benefits under § 3 of same chapter, see TAX, 4.

Construction of ordinance and orders of city other than Boston providing for sewer running in part through private land not a street or way, and

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for assessments therefor, as coming within R. L. c. 49, §§ 3, 5, see TAX, 5–7.

Right of person aggrieved by sewer assessment made by mayor and aldermen of city under ordinance authorized by R. L. c. 49, § 5, or by assessment authorized by § 3 of that chapter for benefits received from construction of sewer through private land not street or way, to revision by jury, see TAX, 5.

SLANDER OF TITLE.

Bill in equity cannot be maintained for alleged slander of plaintiff's title to his property which involves no breach of trust or contract, see EQUITY JURISDICTION, 18.

SMALLPOX HOSPITAL.

Occupation of house by board of health as smallpox hospital without issuance of warrant under Pub. Sts. c. 80, § 43, not unlawful where board had quarantined house because of case of smallpox there and later used house as hospital under lease from owner, see BOARD OF HEALTH, 3.

SNOW AND ICE.

See ICE AND SNOW.

STABLE.

Stable erected by contractor employed by metropolitan park commissioners upon land within park reservation, reasonably necessary for prosecution of their work and erected by their sanction and under their vote, need not be licensed by municipal board of health under R. L. c. 102, § 69, see BOARD OF HEALTH, 1, 2.

STATE HOUSE.

St. 1902, c. 543, as amended by St. 1905, c. 224, as to improvements about State House and takings by eminent domain therefor did not revive St. 1899, c. 457, as amended, but constituted new taking, and claims for damages barred by limitations under earlier act were not revived by later one, see DAMAGES, 2.

STATUTE.

1. By the Resolve of 1896, c. 87, the commissioners appointed to consolidate and arrange the Public Statutes were not authorized to make substantive changes in the statutes but only to suggest "mistakes, omissions, inconsistencies and imperfections" which might appear in the laws and the manner of correcting, supplying and amending them. *Paine* v. *Newton Street Railway*, 90.
2. R. L. c. 175, § 66, providing that a declaration of a deceased person shall not be excluded as hearsay if the court finds that it was made in good

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faith before the commencement of the action and upon the personal knowledge of the declarant, is remedial in its nature and should be construed liberally so as to extend rather than restrict its application. *Hall* v. *Reinherz*, 52.

St. 1903, § 74, corrected and re-enacted by St. 1904, c. 261, is in force as to tax upon franchise of domestic corporations authorized to construct railroads in foreign countries, and not former law fixing tax at one twentieth of one per cent of capital stock, see CORPORATION, 4.

St. 1902, c. 543, as amended by St. 1905, c. 224, as to improvements about State House and takings by eminent domain therefor did not revive St. 1899, c. 457, as amended, but constituted a new taking and claims for damages barred by limitations under earlier act were not revived by later one, see DAMAGES, 2.

Where house was quarantined by board of health because of case of smallpox there, and later, owner giving them lease of premises and receiving rent, house was used by them as smallpox hospital, it was not necessary for the board to issue warrant under Pub. Sts. c. 80, § 43, see BOARD OF HEALTH, 3.

General law for regulation of citizens (regulation as to licensing of stables by board of health) was held subordinate to special statute regulating use of property of Commonwealth (in prosecution of work of metropolitan park commissioners in park reservation), see BOARD OF HEALTH, 1, 2.

Contract of sale of waterworks plant by Revere Water Company to town of Winthrop held to have become binding on company through its compliance with terms of St. 1905, c. 477, and enforceable by town although at town meeting two months after such compliance by company town had refused company's terms, having accepted them at meeting two months later, see MUNICIPAL CORPORATIONS, 5.

St. 1905, c. 477, giving Revere Water Company right on notice after acceptance of act by town of Winthrop to sell town its plant therein at fair valuation, authorizing such purchase by town and providing that town should not construct system of its own unless it first purchased company's plant, but that, if company did not elect to sell, town might construct system of its own, is not appropriation of private property for public use without due process of law and hence not void under fourteenth amendment of Constitution of United States, see REVERE WATER COMPANY, 2.

Fact that R. L. c. 19, § 35, imposes punishment by fine for violation of provisions of that chapter does not deprive veteran who was employed by city as laborer under §§ 23, 24 of that chapter and rules of civil service commissioners and afterwards was discharged or refused employment in violation of those provisions, from recovering damages in action at law of contract, see VETERAN, 2, 3.

Discussion of effect of requirements of St. 1894, c. 548, and St. 1897, c. 500, as to approval by railroad commissioners of plans and certificate by them as to fitness for operation of elevated railway of Boston Elevated Railway Company, after such approval and certificate had been given, upon liability of company for injury to traveller on street from particle of metal falling

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from contact shoe on train owing to failure to provide pan to prevent it, see NEGLIGENCE, 44.

Legislature may at any time suspend or repeal law giving power to levy betterment assessments except so far as obligations of contract are involved, see TAX, 2; application of this rule to legislation (Sts. 1891, c. 323, § 14; 1899, c. 433; 1900, 296) as to assessments for benefits from construction of highway from Malden Bridge to boundary between Boston and Everett, see TAX, 3.

Under St. 1893, c. 277, taking of land for supplying Walpole with water held to include taking of right of lower riparian owner to flow land taken, and it is immaterial that no personal notice was given such owner if notice was given by recording taking under the statute in registry of deeds. Whether such taking would deprive such owner of right to build dam under mill act and set back water, paying damages to owner, was not decided, see WATERWORKS, 1, 2.

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

STATUTES CITED AND EXPOUNDED.

See page 727.

STREET COMMISSIONERS.

Agreement by street commissioners of city of Boston not to assess betterments for laying out of street, unless made under St. 1902, c. 503, is not enforceable, and such agreement contained in deed to city dated when it was practice of commissioners to accept such deeds but delivered when such was not their practice and by them pigeonholed will not sustain action for repayment of betterments paid under protest, see BOSTON, 1, 2.

STREET RAILWAY.

1. A street railway by complying with the terms of a condition imposed by its grant of location from the aldermen of a city does not lose the right to contest the legality of the condition. *Mayor & Aldermen of Worcester* v. *Worcester Consolidated Street Railway*, 106.
2. The obligation of a street railway company to maintain in repair the surface of certain streets imposed by the aldermen of a city in its original grant of location under Pub. Sts. c. 113, § 7, will be enforced specifically in a suit in equity brought by the mayor and aldermen of the city under R. L. c. 112, § 100. *Ibid.*

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3. An obligation to keep in repair the surface of streets in which the tracks of a street railway are laid, imposed on the company by the aldermen of a city under Pub. Sts. c. 113, § 7, in its original grant of location, is preserved and kept in force by St. 1898, c. 578, §§ 11, 13, now R. L. c. 112, §§ 44, 7. *Mayor & Aldermen of Worcester* v. *Worcester Consolidated Street Railway*, 106.

4. The board of aldermen of a city in granting a location to a street railway company under Pub. Sts. c. 113, § 7, have power to impose restrictions requiring the company to pave and maintain in repair the entire surface of streets in which the tracks of its railway are laid, thus exceeding the requirements of § 32 of the same chapter in regard to the portions of streets to be kept in repair by street railway companies. *Ibid.*

5. Restrictions imposed by an order of the board of aldermen of a city granting a location to a street railway company under Pub. Sts. c. 113, § 7, that "said company shall lay and maintain paving in and outside of its tracks as follows:" followed by specifications requiring certain kinds of paving "to be laid and maintained" between the rails and for twelve or eighteen inches outside the tracks on certain streets named, and that on two other streets named "the street shall be paved with blocks for the entire width between the curb lines," requires that the paving on the last named streets shall be maintained as well as laid. *Ibid.*

Actions against street railway companies for personal injuries and damage to property caused by negligence, see NEGLIGENCE, 27–39.

Provisions of U. S. Rev. Sts. § 3995, with regard to obstruction of United States mail, and of R. L. c. 16, § 143, with regard to right of way of troops in streets, properly referred to in charge to jury at trial of action against street railway company by one injured by coming into collision with postal car carrying United States mail, see NEGLIGENCE, 37.

Rulings of State board or commission relative to street railways, which by R. L. c. 112, § 100, Supreme Judicial Court or Superior Court has jurisdiction in equity to review, annul, modify or amend, are rulings of law and not decisions or findings upon questions of fact, and in such proceeding only evidence admissible is proof of evidence that was before such board or commission, see EQUITY JURISDICTION, 15, 16.

Waiver or abandonment of rule of street railway company that persons riding on front platform of car do so at their own risk cannot be established by proof that conductor collected fare of plaintiff, only passenger on front platform, and that neither he nor motorman said anything to plaintiff about rule, nor by statement of plaintiff at trial, "I knew that the sign was a dead letter," nor by fact that passengers often rode there and their fares were collected, see NEGLIGENCE, 27–29.

STRIKE.

Questions in suit in equity by pointers to enjoin strike by members of bricklayers' and of stone masons' unions in refusing to work for contractors who employed the pointers, sought to be maintained on grounds of alleged conspiracy and unlawful interference with contract rights, see LABOR UNION, 1–6.

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SUPERIOR COURT.

1. When an appeal to the Superior Court from a decree of the Land Court specifies no matters which are not adequately presented by the issues framed by the judge of the Land Court no questions of fact other than those raised by the issues can be tried on the appeal. *Luce* v. *Parsons*, 8.

2. Under R. L. c. 128, § 13, as amended by St. 1902, c. 458, St. 1904, c. 448, and St. 1905, c. 288, on an appeal to the Superior Court from a decree of the Land Court, if the issues framed in the Land Court are found in the Superior Court to be inadequate properly to present all the matters specified in the appeal, *semble*, that the Superior Court has power, on the application of a party, to modify or enlarge the issues relating to the matters specified, although the Superior Court would not be expected to frame additional issues or to change existing issues without very good reasons for doing so. *Ibid.*

TAX.

To whom assessable.

1. Under St. 1889, c. 84, (R. L. c. 12, § 15, St. 1902, c. 113,) an assessment of a tax on real estate to one holding under a tax deed which is regular on its face and is duly recorded is made to the right person, whether his title is valid or not. *Roberts* v. *Welsh*, 278.

Assessments for Benefits.

2. The right to levy betterment assessments exists only by statute and the Legislature may at any time suspend or repeal the law authorizing such assessments, either generally or in a particular case, except so far as obligations of contract are involved. *Stone* v. *Street Commissioners*, 297.

3. St. 1900, c. 296, § 1, authorizing the street commissioners of the city of Boston to lay out, widen and order the construction of the causeway and other parts of the highway between Malden Bridge and the boundary line between the city of Boston and the city of Everett, and providing that "no assessment shall be made for such laying out and construction," repealed by implication the law relating to betterment assessments in relation to the particular improvement authorized, and the repeal applies to relocation proceedings relating to the highway in question instituted before the passage of St. 1900, c. 296, including an order purporting to make assessments under St. 1891, c. 323, § 14, as amended by St. 1899, c. 433. *Ibid.*

Construction of ordinance and orders of city other than Boston making assessment for benefits received from construction of sewer through private land not street or way under R. L. c. 49, § 3, power of mayor and aldermen under that statute to construct such sewer, and right of revision by jury of persons aggrieved by such assessment, see *post*, 4–6.

Agreement by street commissioners of city of Boston not to assess betterments for laying out of street, unless made under St. 1902, c. 503, is not enforceable, and such agreement contained in deed to city dated when it was practice of commissioners to accept such deeds but delivered when

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such was not their practice, and by them pigeonholed will not sustain action for repayment of betterments paid under protest, see BOSTON, 1, 2.

Sewer Assessments.

4. The mayor and aldermen of a city under R. L. c. 49, § 1, have power to construct a sewer running through private lands and not in any street or way and to make an assessment under § 3 of the same chapter for benefits received from its construction. *Taylor* v. *Mayor & Aldermen of Haverhill*, 287.
5. R. L. c. 49, § 4, giving a right to revision by a jury to persons aggrieved by a sewer assessment imposed by the mayor and aldermen of a city or the sewer commissioners, selectmen or road commissioners of a town, applies to an assessment made by the mayor and aldermen of a city under an ordinance authorized by the provisions of § 5 of the same chapter, and also applies to an assessment made by the mayor and aldermen of a city under § 3 of the same chapter for benefits received from the construction of a sewer running through private lands and not in any street or way. *Ibid.*
6. Where an ordinance of a city other than Boston provides that sewer assessments within the territory of its sewer system "shall be by fixed, uniform rates based upon the estimated cost of all sewers therein, both according to the frontage of such estates on any street or way where a public sewer is constructed and according to the area of such estates within a fixed depth of one hundred and fifty feet from such street or way," and establishes such rates, if the mayor and aldermen of the city make a sewer assessment under this ordinance it is made under the authority conferred by § 5 of c. 49 of the Revised Laws and not under § 7 of that chapter, and there can be no question as to the portion of the land covered by the assessment, as it must cover the entire frontage on the street and extend back one hundred and fifty feet and no more. *Ibid.*
7. Where the mayor and aldermen of a city make a sewer assessment under R. L. c. 49, § 3, for benefits received from the construction of a sewer running through private lands, the owners of which have granted to the city the right to lay the sewer through their lands, and not running in any street or way, but in the order making the assessment it is declared to be made under a certain ordinance of the city relating to assessments for the construction of sewers in streets or ways, and providing for such assessment according to the frontage of the estates assessed on such street or way and according to the area of such estates within a fixed depth of one hundred and fifty feet from such street or way, although the assessment for the sewer through private lands is not made under the ordinance the reference to the ordinance indicates that a lot thus assesssed embraces the whole front upon the strip conveyed to the city by its owner and extends back one hundred and fifty feet from that strip. *Ibid.*

Corporation Tax.

Domestic corporations authorized to construct railroads in foreign countries are subject to domestic franchise tax imposed by St. 1903, § 74, as cor-

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rected and re-enacted by St. 1904, c. 261, and not to former tax of one twentieth of one per cent upon par value of capital stock, see CORPORATION, 4.

Valuation List.

8. A description of real estate in the valuation list kept by the assessors of a city under the requirements of the statutes is sufficient if it gives the number of the house, the designation of the lot on which it stands and the number of square feet in the lot. *Roberts* v. *Welsh*, 278.
9. The description of real estate in the valuation list kept by the assessors under the statutes now contained in R. L. c. 12, §§ 56–66, need not have the accuracy required for a conveyance. It is sufficient if it fairly designates the property for the information of those interested. *Ibid.*

Abatement.

10. A public service corporation may maintain a petition under R. L. c. 12, § 73, for the abatement of a tax assessed upon land held by it under statutory authority for a public purpose and thus exempt from taxation, although the result of granting the petition will be to abate the whole of the tax. *Milford Water Co.* v. *Hopkinton*, 491.
11. A public service corporation is not estopped from maintaining a petition under R. L. c. 12, § 73, for the abatement of a tax assessed upon land held by it for a public purpose and thus exempt from taxation by the fact that it included the land in the list of taxable property which it returned to the assessors. *Ibid.*

Exemption.

12. If a public service corporation, incorporated for the purpose of supplying the inhabitants of a certain town with water and given by statute authority to take and hold land in another town for the purposes named in its charter, acquires for these purposes either by purchase or by a taking under the authorizing statute land which it has the right to take under the statute, such land so far as it is necessary and proper for the purposes of the charter of the corporation is exempt from taxation. *Milford Water Co.* v. *Hopkinton*, 491.
13. The Milford Water Company, incorporated by St. 1881, c. 77, for the purpose of furnishing the inhabitants of Milford with water, and authorized by St. 1882, c. 188, to take and hold any real estate south of a certain street in the town of Hopkinton necessary and proper for the purpose of supplying the town of Milford with water, acquired by a taking under the act, or in part by purchase ratified by a subsequent taking, land in Hopkinton south of the street named in the act, and constructed thereon a dam and reservoir which it held and used for the purposes of its charter. *Held*, that the real estate of the water company thus acquired and used was not subject to taxation by the town of Hopkinton. *Ibid.*
14. The provision of St. 1857, c. 154, § 2, that the Evangelical Benevolent and Missionary Society incorporated by that chapter "may hold real and personal estate to the amount of three hundred and fifty thousand dollars, which property, and the net income thereof after the same has been paid

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for, shall be appropriated exclusively for the purposes in this act specified, and the same shall be exempted from taxation," exempts from taxation the property of that corporation only to the amount named, and does not operate as a specific exemption from taxation of the first property acquired by the corporation which consisted of real estate worth at the time of its acquisition less than $350,000. Hardy *v.* Waltham, 7 Pick. 108, and Harvard College *v.* Boston, 104 Mass. 470, distinguished. *Evangelical Baptist, &c. Society* v. *Boston*, 412.

Collector's Deed.

15. A description of real estate in a tax deed which is correct except in the use of the word "about" before two of the measurements which are in fact exact is not rendered uncertain or incorrect by the use of this word. *Roberts* v. *Welsh*, 278.

16. A description of real estate in a tax deed giving the front line of a lot on a city street as "about sixty-three feet" and giving the point of beginning as "about one hundred and twelve feet" from another street, whereas the lot taxed and intended to be sold was sixty-five feet wide on the street and the point of beginning was one hundred and ten feet from the other street, makes the sale invalid and the deed void, the collector having no authority to sell less than the whole of the lot. *Ibid.*

TREMONT TEMPLE.

No exemption from taxation of Tremont Temple property of Evangelical Baptist Benevolent and Missionary Society beyond value of $350,000, under provisions of St. 1857, c. 154, § 2, see TAX, 14.

TRESPASS.

As to taxation of costs in action of tort in nature of trespass *quare clausum fregit* where verdict finally was not in excess of $20, see PRACTICE, CIVIL, 17, 18.

One who by false representations that she is student under eighteen years of age procures a ticket and rides on a railroad, she being shop girl over eighteen years of age, is a trespasser and does not have rights as passenger, see NEGLIGENCE, 46; CARRIER, 1, 2.

TRUST.

Equitable Fee Simple.

1. One of two partners having acquired certain land in his own name executed a declaration of trust to the effect that he held the land in trust for his partner J. R. and himself for the benefit of the firm until its dissolution, declaring that "the rest and residue, if any there be, shall be held by me or my heirs in trust one half for myself and my heirs and one half in trust for the said J. R. and his heirs as tenants in common, and at the request of any party interested the trust shall then cease and by proper

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conveyances the legal title shall then be made to stand one half in me and my heirs and one half in the said J. R. and his heirs as tenants in common." *Held*, that J. R. took an equitable estate in fee simple which he might devise. *Reardon* v. *Reardon*, 448.

Expression of Purpose creating no Trust.

2. A will provided as follows: "I give and bequeath to my beloved wife L. all my real and personal estate wherever situated of which I may die possessed for the purpose of maintaining herself and our children to her and her heirs forever." *Held*, that the widow took an absolute devise in fee simple in the real estate of the testator, and that no trust was created. *Pitts* v. *Milton*, 88.

Creation without Use of Word "Trust."

3. Where a testatrix devises all of her real estate to her son and her brother "their heirs and assigns in fee simple" and then makes numerous provisions as to the management and disposition of the real estate and as to payments to be made from the proceeds of it, although neither the word "trust" nor the word "trustee" is used, a trust is created, and the devisees hold the legal title to the property in trust to manage and finally dispose of it according to the directions in the will. *Robinson* v. *Cogswell*, 79.

Precatory.

4. A will creating a trust, after providing for paying one half of the net income of the trust fund to the widow of the testator during her life, contained the following provision: "After the decease of my said wife, one half of the principal of said trust estate is to be paid over and conveyed to such person or persons, and in such proportions as my said wife shall by will appoint, but it is my wish and desire that if my wife has received from my daughter and her family the affection and respect, to which she is entitled, that she then will appoint said share of said trust estate to my daughter and her children, in such way and manner, and in such proportions, as to her may seem best — but in case my said wife shall die without making any appointment of her share of said trust estate, then the same shall be added to the share held in trust for my daughter and her children and be held upon the same trusts." The widow exercised the testamentary power by appointing her share of the fund to persons other than the daughter of her husband and the children of such daughter, and declaring that since the death of her husband she had not received from his daughter and her family the affection and respect to which she was entitled. *Held*, that the words "wish and desire" did not create a precatory trust, and therefore that the question of fact whether the appointing testatrix had received from her husband's daughter and her family the affection and respect to which she was entitled was immaterial. *Holmes* v. *Dalley*, 451.

Deposit in Savings Bank.

5. A widow made a deposit in a savings bank in her name "in trust for E." E. was her nephew, whose first name at her request had been

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changed to that of her deceased husband. At the time of making the deposit she signed a declaration that no written trust existed, that the deposit was to be payable to her or her order during her life, and after her death to E. She made statements to E.'s father and mother and to other persons that she had remembered E. well and that she wanted him to have the money that she had deposited in the bank for him. She retained the possession and control of the bank book until her death, and left a will in which no provision was made for E. *Held*, that there was no evidence of a delivery and acceptance of a gift during the lifetime of the depositor or of anything tantamount to a delivery and acceptance, and that the deposit continued to be the depositor's as long as she lived and when she died passed to the executor of her will. *Bailey* v. *New Bedford Institution for Savings*, 564.

Constructive.

6. A trust cannot be established against the proceeds of trust property wrongfully disposed of by the trustee, which are in the hands of the administrator of his insolvent estate, unless such proceeds can be identified and traced into some specific fund or property. *Lowe* v. *Jones*, 94.
7. A trust cannot be declared against the insolvent estate of a deceased person on the ground that the proceeds of trust property wrongfully disposed of by the deceased went into the general assets of his estate and thus increased the amount in the hands of the administrator. *Ibid.*
8. If one holding in trust certain shares of stock wrongfully pledges them to a bank to secure his own debt, and afterwards dies insolvent, the *cestui que trust* cannot compel the administrator of the insolvent estate to use the general assets of the estate to pay in full the debt to the bank to redeem the stock from the pledge, especially where only the trust property is pledged and there is no opportunity to marshal assets in the payment of the debt. *Ibid.*

Validity.

9. A power reserved in an instrument creating a trust to revoke or terminate the trust does not make the trust invalid. *Seaman* v. *Harmon*, 5.

Accounts of Trustee.

10. The rule long settled in this Commonwealth that a commission paid by a trustee to a broker for negotiating a sale of personal property belonging to the trust is to be charged to income and not to capital applies equally to the payment of a broker's commission for negotiating a sale of real estate belonging to the trust. *Jordan* v. *Jordan*, 337.
11. Where an estate of great value, nearly one third of which consists of real property, is held under the provisions of a will by trustees having large discretionary powers as to investments and the management of the estate, in trust to pay the income to certain beneficiaries during a period fixed by the will with a remainder over, if the trustees find it expedient from time to time to make extensive alterations in the real property in order to obtain tenants and to render the whole estate productive so that

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the income can be kept at a fixed standard or increased in amount, the expenses incurred by the trustees in good faith for these purposes properly can be paid out of the income of the estate without charging any part of them to capital, although incidentally the immediate value of the buildings may have been increased by the improvements. *Jordan* v. *Jordan*, 337.

12. Where an estate of great value, nearly one third of which consists of real property, is held under the provisions of a will by trustees having large discretionary powers as to investments and the management of the estate, in trust to pay the income to certain beneficiaries during a period fixed by the will with a remainder over, and where the testator in his will expressed his high opinion of permanent investments in real estate and suggested to the trustees that before making any sale under the power given them in the will they should fully consider the expediency of doing so, and where also during the existence of the trust the net income of the entire estate has been reasonably adequate for the purposes of the trust and has been paid to the beneficiaries from the time of the testator's death, if the estate includes several parcels of realty left by the testator which have been either entirely unproductive or have not produced sufficient income to pay taxes and the cost of maintenance, although it is the duty of the trustees to convert this unproductive property into a fund that will produce revenue without unnecessary delay, until such conversion they are justified in paying from the general income of the estate all charges necessary in carrying the unproductive realty; and, if within a period of five years after the death of the testator they sell certain of these unproductive parcels at a profit above the inventory valuations, the proceeds of such sales belong to capital without any deduction in favor of income by reason of delay in the conversion of the property, such delay having been contemplated by the testator. *Ibid.*

Enforcement.

Sister of testatrix is entitled to enforce by suit in equity trust in real estate devised to testatrix's son and brother in trust to "see to it" that plaintiff is "suitably and comfortably maintained" for life, see EQUITY JURISDICTION, 19.

Dower.

Wife has no dower rights in real estate held in trust for husband he not having had legal seisin at any time during coverture, see DOWER, 2, 3.

Equitable Conversion of Trust Property.

13. Where a will does not direct that the real estate of the testator shall be converted into personal property but gives to the trustees thereunder power to sell and convey the trust property and to make new investments, a fund resulting from a sale of real estate retains its original character until it reaches one who has the right to treat it as his own absolutely and for all purposes. *Gray* v. *Whittemore*, 367.

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UNITED STATES MAIL.

At trial of action against street railway company by one injured by coming into collision with postal car carrying United States mail operated by street railway company, presiding judge properly referred in charge to jury to provisions of U. S. Rev. Sts. § 3995, with regard to obstruction of United States mail, and of R. L. c. 16, § 143, with regard to right of way of troops in streets, see NEGLIGENCE, 37.

USAGE.

Effect of "usual custom" of cement trade at place of delivery on construction of contract for sale of cement as to matter not mentioned therein, see CONTRACT, 3.

VETERAN.

1. Under R. L. c. 19, §§ 23, 24, however it may be in other matters, in regard to the right to preference for continuous employment there is no distinction between a veteran who has been registered, certified and employed in the labor service of a city or town and a veteran who has been examined, registered and employed as a public officer. *Ransom* v. *Boston*, 299.

2. Where a veteran is employed by a city as a laborer under the terms of R. L. c. 19, §§ 23, 24, and of rules made by the civil service commissioners under the last named section, there is a contract between the veteran and the city in accordance with the provisions of the statute and the rules in regard to the terms of his employment, and if he is discharged or refused employment in violation of these provisions he may recover his damages in an action of contract. *Ibid.*

3. Rules made by the civil service commissioners under R. L. c. 19, § 24, in regard to the preference of veterans, provided that "when laborers are required, the employing officer shall make requisition upon the commissioners, stating the number of men wanted, the precise nature of the labor in which they are to be employed and the time and place of employment," that "upon such notice, the commissioners shall certify the names of any and all veterans upon the eligible list, and the employment must be made from the list so certified," and that "the employing officer shall, before selecting or employing any other person, first employ from the list of veterans certified." *Held*, that under these rules a veteran employed in the labor service of a city or town has the right to continuous employment in preference to those laborers who are not veterans so long as there is work to be done of the kind for which he was employed and he is competent to perform it. *Ibid.*

4. In an action by a veteran who has been employed by a city as a laborer against the city for refusing to continue his employment and employing others, not veterans, to do work which he might have done, if the plaintiff proves his case the measure of his damages is the pay which he would have earned less what he earned or in the exercise of proper diligence might have earned elsewhere. *Ibid.*

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5. If a public officer *de jure* whose salary has been paid to an officer *de facto* must establish his right by mandamus before he can be given any pecuniary relief, this rule has no application to an action brought by a veteran against a city for refusing to continue to employ him as a laborer and employing other persons not veterans to his exclusion. *Ransom* v. *Boston*, 299.
6. The fact that R. L. c. 19, § 35, imposes a punishment by fine for a violation of the provisions of that chapter relating to the civil service or of the rules of the civil service commissioners made under those provisions, does not deprive a veteran employed by a city as a laborer of a right of action against the city for a breach of contract in failing to comply with the terms of such provisions and rules under which he was employed. *Ibid.*

VETO.

Validity of veto by mayor of Boston under city charter of vote of board of aldermen and city council returned by him more than ten days after its delivery to his clerk but within ten days after it was presented to him personally, see BOSTON, 3, 4.

WAIVER.

Waiver or abandonment of rule of street railway company not shown by acts of conductor or motorman, see NEGLIGENCE, 28, 29.

WALPOLE.

Taking of land under St. 1893, c. 277, for supplying Walpole with water held to include taking of right of lower riparian owner to flow land taken. Whether such taking would deprive such owner of right to build dam under mill act and set back water, paying damages to owner, was not decided, see WATERWORKS, 1, 2.

WARRANTY.

Whether, on evidence, there was an implied warranty that pulley furnished for certain purpose was of certain size, see SALE.

WATERCOURSE.

See WATERWORKS, 1, 2.

WATER RIGHTS.

Taking of land under St. 1893, c. 277, for supplying Walpole with water held to include taking of right of lower riparian owner to flow land taken. Whether such taking would deprive such owner of right to build dam under mill act and set back water, paying damages to owner, was not decided, see WATERWORKS, 1, 2.

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WATER SUPPLY.

See METROPOLITAN WATER SUPPLY ACT.

WATERWORKS.

1. Whether a town by a taking of land for the purpose of supplying its inhabitants with water, under a statute authorizing it to take and hold certain waters and the water rights connected therewith and all lands and easements necessary for holding and preserving such water, would deprive a riparian proprietor on the stream below of his right to build a dam under the mill act and set back water on the land above by paying damages to the owner, was not decided in this case because the question was not raised. *Walpole* v. *Massachusetts Chemical Co.* 66.
2. Under St. 1893, c. 277, authorizing the town of Walpole, for the purpose of supplying itself and its inhabitants with water, to take and hold certain waters and the water rights and water sources connected therewith, and also all lands and easements necessary for holding and preserving such water, a taking of an entire parcel of land for the purposes named in the statute, describing it by metes and bounds and as if it were unincumbered, includes the taking from a riparian owner on a stream below of an easement to flow the land in connection with a dam on that stream, and it is immaterial that no personal notice of the taking was given to the owner of the easement if notice was given by recording the taking in the registry of deeds in accordance with the terms of the statute. *Ibid.*

Determination of questions of law arising from votes of selectmen and successive town meetings of town of Winthrop as to purchase of waterworks plant from Revere Water Company, see CONSPIRACY, 2, 3; MUNICIPAL CORPORATIONS, 2–5; REVERE WATER COMPANY, 1, 2.

WAY.

Laying out of Highway.

1. In laying out a street the members of a city council act as public officers representing a continuous body, and such a laying out begun by and partly heard before one city council, after a further hearing before another city council, finally may be completed by a third city council before which there has been no hearing. *Taintor* v. *Mayor & City Council of Cambridge*, 522.
2. Under the provision of § 94 of R. L. c. 48, relating to highways and town ways, that "the provisions of the preceding sections, so far as applicable, shall apply to cities, except as may be otherwise provided by their charters or by special laws," the provision of § 4 of the same chapter that the county commissioners in laying out a highway shall, if requested, view the premises, does not apply to the laying out of a highway by a city council, and in that case a view taken by the joint committee on highways of the city council is sufficient. *Ibid.*
3. Where a city council has referred the matter of the laying out of a street

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Way (*continued*).

to its joint committee on highways, and that committee, after taking a view and giving a hearing to all persons interested, by a report to the city council recommend the laying out of the street and the adoption of an order accompanying the report which recites that public convenience and necessity require that the street should be laid out, and the city council, after a hearing of which all persons interested have had notice, refers this order to the board of survey, a body created by statute for the purpose of passing upon the laying out and construction of highways in the city, this constitutes an adjudication by the city council that the public convenience and necessity require the laying out of the street. *Taintor* v. *Mayor & City Council of Cambridge*, 522.

Rights in and Use of Public Way.

Negligence in use of highway, see NEGLIGENCE, 31–39, 41–45, 47.

Duties and liabilities of one owning or controlling premises adjoining sidewalk which is part of highway of city as to clearing ice and snow from sidewalk and scattering ashes thereon, see NUISANCE, 4, 5, 6.

One owning and controlling house abutting on private way not part of his premises liable to woman visiting on business another house abutting on same way for injuries due to nuisance in the way arising from negligent construction and maintenance of eaves, gutters and conductors of his house, see NUISANCE, 2, 3.

Power of board of aldermen of city in granting location to street railway company to impose restrictions as to paving and repairing of surface of streets, construction of certain restrictions so imposed, and enforcement of them by bill in equity, see STREET RAILWAY, 1–5.

R. L. c. 16, § 143, with regard to right of way of troops in streets, as well as U. S. Rev. Sts. § 3995, with regard to obstruction of United States mail properly referred to the charge to jury at trial of action against street railway company by one injured in collision with postal car, see NEGLIGENCE, 37.

Land Court has jurisdiction to determine whether public has acquired right of way by prescription over land of petitioner for registration adjoining highway and city has right of appeal from decree of Land Court deciding that no such right of way exists; whether attorney general also has right to appeal as representing public, *quaere*, see LAND COURT, 1, 2.

WIDOW.

Right of widow to allowance not affected by previous exhaustion of property of estate by executors in payment of debts before expiration of one year from date of their appointment, see EXECUTOR AND ADMINISTRATOR, 1, 2.

Widow's dower, see DOWER, 1–4.

WILL.

1. A finding that the execution of an instrument purporting to be a will was procured by fraud or undue influence can be sustained on evidence which is wholly circumstantial. *Hoffman* v. *Hoffman*, 416.

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2. At the trial of an appeal from a decree of the Probate Court allowing a will, the jury found that the testator was of sound and disposing mind and memory, and also found that the alleged will was procured to be made through the fraud or undue influence of the testator's second wife who was named in the instrument as executrix. It appeared that at the time of the marriage the second wife was thirty years of age and the alleged testator seventy-five years of age and unattractive in person, and there was evidence warranting a finding that the marriage on the part of the wife was wholly mercenary. There was evidence that after the marriage the relations between the testator and his children and their families, and his old friends, which formerly had been affectionate and intimate, underwent a great change, and that after the marriage he saw them very little, that before the marriage the testator had declared repeatedly that he would not make a will and that his property should go according to law and his children should have it, that he promised his first wife in her last sickness that he would see that the children had it, that by the instrument purporting to be his will he left to each of his children the sum of $2,000, increased from $1,000 at the suggestion of his legal adviser, and left all the rest of his estate amounting to upwards of $50,000 to his second wife, that he requested the scrivener in drawing his will to make a memorandum that his wife did not know of the matter, that at the time the instrument was executed he was a feeble old man suffering from a complication of diseases incident to his age and was mentally in a condition to be easily influenced by a designing person. *Held*, that the court could not say that the jury were not warranted in finding that the execution of the instrument was procured by fraud or undue influence on the part of the testator's second wife named as executrix. *Hoffman* v. *Hoffman*, 416.

Construction of wills, see DEVISE AND LEGACY; TRUST, 2–4.

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Determination of questions of law arising from votes of selectmen and successive town meetings of town of Winthrop as to purchase of waterworks plant from Revere Water Company, see CONSPIRACY, 2, 3; MUNICIPAL CORPORATIONS, 2–5; REVERE WATER COMPANY, 1, 2.

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There is no rule of law requiring presiding judge to instruct jury as to weight to be given to testimony of accomplice in criminal trial in which accomplice is principal witness for Commonwealth, see PRACTICE, CRIMINAL, 1.

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"About." See *Roberts* v. *Welsh*, 278, 280.

"Accepting this option." See *Martyn* v. *Hitchings*, 71, 78.

"Carrying on business for profit." See *Tulane University* v. *O'Connor*, 428, 433.

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Words (*continued*).

"Debt." See *Purdon* v. *Blinn*, 387, 389.
"Heirs." See *Gray* v. *Whittemore*, 367, 380.
"Heirs at law." See *Gray* v. *Whittemore*, 367, 380.
"Lessees." See *Hollywood* v. *First Church in Brockton*, 269, 276.
"Option." See *Martyn* v. *Hitchings*, 71, 78.
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